Petition

81-2022

No. _____

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF MISSOURI, et al.
Petitioners,

v.

CRATON LIDDELL, et al.,
and,
EARLINE CALDWELL, et al.,
and,
JANICE ADAMS, et al.,
and,
BOARD OF EDUCATION OF THE
CITY OF ST. LOUIS, MISSOURI, et al.,
and,
THE CITY OF ST. LOUIS, MISSOURI,
and,
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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April, 1982

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Hills* v. *Gautreaux* was intended to modify this Court's decision in *Milliken* v. *Bradley* and if not, whether this Court's decision in *Hills* v. *Gautreaux* permits implementation of an interdistrict remedy which would restructure the operation of a state governmental entity, based only on an intradistrict violation?

2. Whether a school district established after *Brown* v. *Board of Education* and not part of a mandated dual system of education is under an affirmative duty as established by *Green* v. *School Board of New Kent County, Virginia* or under the standard established in *Keyes* v. *School District No. 1* requiring specific purpose and intent to segregate?

3. Whether the District Court's order rejecting a consent degree but then ordering implementation of an interdistrict remedy in excess of said consent decree, without a liability hearing or a finding of an inter-district violation and an inter-district effect, was beyond the District Court's jurisdiction and in conflict with this Court's decision in *United States* v. *Armour and Company*?

4. Whether petitioners were denied procedural due process guaranteed by the Fifth Amendment to the United States Constitution because they were found liable 1) without any pleadings filed against them 2) without notice that their liability was at issue and 3) without an opportunity in court to defend themselves?

LIST OF ALL PARTIES

1. State of Missouri; Christopher S. Bond, Governor of the State of Missouri; Mel Carnahan, Treasurer of the State of Missouri; John Ashcroft, Attorney General of the State of Missouri; John Peltzer, Commissioner of Administration; Arthur L. Mallory, Commissioner of Education; State Board of Education; Delmar A. Cobble, Grover Gamm, Jimmy Robertson, Dale M. Thompson, Irving A. Williams, Donald W. Shelton, and Robert Welling, Members of the State Board of Education.

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Court Appointed Amicus

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THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, the State of Missouri, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 2, 1981, dismissing petitioner's appeal of the District Court's Order of June 11, 1981, and the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 25, 1982, and affirming the Judgments and Order of the United States District Court for the Eastern District of Missouri entered on June 11, 1981, and July 2, 1981.

OPINIONS BELOW

The opinions of the District Court are reported at 469 F.Supp. 1304 (E.D.Mo. 1979) and 491 F.Supp. 351 (E.D.Mo. 1980). The first Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 620 F.2d 1277 (8th Cir. 1980). The second Opinion of the Court of Appeals is as yet unreported, but is reprinted herein as Appendix A. A copy of the order of the United States Court of Appeals for the Eighth Circuit denying the petitioners for rehearing is printed herein as Appendix B.

The Opinions of the District Court entered on June 11, 1981, and July 2, 1981, are as yet unreported and are attached hereto as Appendix C and D respectively. The Opinion of the Court of Appeals entered on February 25, 1982, is as yet unreported and is attached hereto as Appendix E.

JURISDICTION

The most recent judgment and mandate of the Court of Appeals was filed on February 25, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

On February 19, 1982 petitioners filed a timely application for extension of time within which to file this petition for writ of certiorari, which application was granted by the Honorable Harry A. Blackman on February 23, 1982, extending the time to file this petition to May 1, 1982.

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment XIV, Section 1.

> "All persons born on naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a school desegregation case which was initially filed February 18, 1972, by the Liddell Plaintiffs against the Board of Education of the City of St. Louis, Missouri, its members, and certain named administrators (City Board). The Liddell Plaintiffs and the City Board entered into a consent decree which was approved by the District Court on December 24, 1975. In January of 1976 objections to the proposed consent decree were filed by a second group of black parents, (Caldwell) who were joined by the St. Louis chapter of the NAACP. At this time the Caldwell group also moved to intervene as party plaintiffs. The District Court's denial of the motion to intervene was reversed by the United States Court of Appeals for the Eighth Circuit. *Liddell* v. *Caldwell,* 546 F.2d 768 (8th Cir. 1976).

Following the remand by the Court of Appeals, the United States, the City of St. Louis, and the Adams group were allowed to intervene as plaintiffs. Also during 1977 the State of Missouri, the Commissioner of Education of the State of Missouri and the State Board of Education and its individual members were added as defendants.

Following a 16 week trial on the merits in 1977 and 1978 the District Court handed down its decision on April 12, 1979, and found that the State had met its constitutional duty and the City Board had disestablished the former dual school ssytem. *Liddell* v. *Board of Education, City of St. Louis,* 469 F.Supp. 1304 (E.D.Mo. 1979). The United

States Court of Appeals for the Eighth Circuit reversed and found that the formerly mandated dual school system had not been disestablished. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir. 1980). The Adams plaintiffs petition for writ of certiorari was denied. *Adams* v. *United States*, ____ U.S. ____, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

Following the remand by the Court of Appeals the City Board submitted its plan for desegregation of the public school system to the District Court. After several days of hearings in May of 1980 the District Court approved the plan in an order entered May 21, 1980, and filed Findings of Fact and Conclusions of Law on June 3, 1980. *Liddell* v. *Board of Education, City of St. Louis*, 491 F.Supp. 351 (E.D.Mo. 1980). In the course of the findings and order the District Court concluded that the State of Missouri was the primary constitutional wrongdoer and directed the State of Missouri to fund up to one-half of the desegregation plan or approximately $11 million the first year. The District Court also ordered the State Defendants, the United States and the City Board to: [12(a)] develop a plan for voluntary, cooperative pupil exchanges with the school districts of St. Louis County; [12(b)] develop a plan for the consolidation and merger of the separate vocational education programs of the Special School District of St. Louis County and the School District of the City of St. Louis; and [12(c)] develop and submit to the court a suggested plan of inter-district desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County. *Id.* at 353. The judgment of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit in an opinion entered on February 13, 1981. A copy of the opinion, as yet unreported, is printed herein as Appendix A. Petitions for rehearing were denied by the Court of Appeals on March 19, 1981. A

copy of the order denying the petitions for rehearing is printed herein as Appendix B.

During the pendency of the appeal to the Court of Appeals, the Caldwell Plaintiffs and the City Board filed motions for leave to amend their pleadings to add some forty school districts as additional defendants and to assert claims for inter-district relief. On August 24, 1981, those motions were granted in part.

Modifications to paragraphs 12(a) through 12(c) of the May 21, 1980, Order were made by orders entered by the District Court on September 17, 1980, and December 19, 1980. These orders are printed herein as Appendices F and G. In an order entered on March 4, 1981, the District Court directed the State Defendants to prepare another plan for voluntary pupil exchanges pursuant to paragraph 12(a) of the District Court's Order of May 21, 1980. This order is printed herein as Appendix H.

Commencing May 11, 1981, a series of hearings were scheduled for the purpose of (1) hearing testimony on the various 12(a) inter-district plans submitted to the court, (2) determining the liability, if any, of the Special School District of St. Louis County and (3) hearing testimony on 12(b) inter-district vocational education plans submitted to the court. On May 21, 1981, a consent decree was presented to the court signed by certain of the parties to the proceeding and a funding order was approved by the court with relation to said consent decree. A copy of said consent decree is attached hereto as Appendix J. Subsequently on June 11, 1981, the court entered its order rejecting the consent decree but accepting the plan agreed to by the parties and incorporating in its order the elements of the consent decree as well as other significant elements. A copy of said order is attached hereto as Appendix C. Following a full hearing on the various plans sub-

mitted pursuant to paragraph 12(a) of the court's Order of May 21, 1980, the District Court on July 2, 1981, entered its order for a 12(a) inter-district plan giving suburban school districts thirty (30) days in which to respond to the court as to whether or not they would participate in the voluntary plan ordered by the court. On August 24, 1981, the District Court accepted four school districts as volunteers under the court's 12(a) inter-district plan and ordered all inter-district litigation stayed against those participating districts and others.

On December 2, 1981, the United States Court of Appeals for the Eighth Circuit entered an order which, inter alia, dismissed Petitioners appeal of the court's Order of June 11, 1981, except as to the issue of funding. On January 11, 1982, oral argument was heard on approximately nineteen appeals pending before the United States Court of Appeals for the Eighth Circuit and its decision on those appeals was rendered on February 25, 1982. A copy of that decision as yet unreported is attached hereto as Appendix E.

Petitioners filed an application for extension of time within which to file their petition for writ of certiorari on February 19, 1982, and said application was granted by the Honorable Harry A. Blackman on February 23, 1982, extending the time within which to file this petition for writ of certiorari to May 1, 1982.

REASONS FOR GRANTING THE WRIT

I.

The court of appeals' decision affirming the District Court's Order of July 2, 1980, ordering an inter-district remedy without first finding an inter-district violation and inter-district effect is in conflict with this court's decision Milliken **v.** Bradley I.

In its decision of February 25, 1982, (Appendix E) the Court of Appeals found:

> "Paragraph 12(a) is entirely enforceable against the state defendants; they are primary constitutional wrongdoers and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district. *Hills* v. *Gautreaux,* 425 U.S. 284 (1976)." *Id* at 7.

However, no pleadings asserting an inter-district violation and seeking an inter-district remedy were filed until August 24, 1981, and in that case the parties are only now devising a discovery schedule. Thus, there has been no finding of an inter-district violation and an inter-district effect. The only finding of liability is intra-district in nature. As pointed out in IV, *infra,* petitioners vigorously contest that finding of liability. However, assuming *arguendo,* the existence of such liability, it does not support or justify the District Court's Order of July 2, 1981, establishing an inter-district remedy which mandates State participation without finding an inter-district violation and an inter-district effect, because such order is contrary to the principles established by this Court in *Milliken* v. *Bradley,* 418 U.S. 717(1974) (*Milliken I*).

In *Milliken I* this Court stated: :

"Before the boundaries of separate and autonomous

> school districts may be set aside by consolidating the separate units for remedial purposes *or by imposing a cross-district remedy,* it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . Conversely, without an interdistrict violation *and* interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745. (Emphasis added.)

In *Milliken I* this Court reaffirmed the principle established in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Id.* at 16. This Court also acknowledged in *Milliken I* that ". . . our prior holdings have been confined to violations *and* remedies within a single school district." *Id.* at 744. (Emphasis added.) Thus, *Milliken I* established a federal court's authority to impose an inter-district remedy based on a finding of an intra-district violation only, and established the necessary requisites for imposing such inter-district remedy. Petitioners submit that those requisites are missing in this case and therefore certiorari is appropriate. As pointed out in IV, *infra,* no allegations were filed against petitioners prior to the alleged finding of liability and none of the suburban school districts were parties to said litigation at the time. In addition, assuming *arguendo,* petitioners intra-district liability, the existence of such liability is not supported by the strong findings of state liability existent in *Milliken I,* where under Michigan law "school building construction plans had to be approved by the State Board of Education, and prior to 1962,

the State Board had specific authority to supervise school-site selection." *Id.* at 727. Under Missouri law, neither the State Board of Education nor any state department or official possesses such authority. In addition, the District Court in *Milliken I* made specific findings concerning the Michigan legislature's failure, until 1971, to provide certain transportation funds for the City of Detroit that were provided to the mostly white suburbs. No such findings have been made nor could they be made in Missouri.

Finally, in *Milliken I* this Court properly recognized the tradition and importance of local autonomy in the fabric of public education in this country:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . ." *Id.* at 741.

In making this determination this Court's footnote 20 set out the Michigan statutes which provide this measure of local control. While local autonomy per se is not at issue in the 12(a) inter-district plan challenged herein, it points out the lack of authority of state entities to control public education except on a limited basis. As pointed out in Appendix I attached hereto, local autonomy is even stronger in Missouri. The Constitution of Missouri adopted by the people in 1945 even precludes the Missouri Legislature from enacting certain laws dealing with public education at the local level. Thus, those rights were retained by the people and the people alone, including the right to establish, change, or merge school district boundaries. Accordingly, the justification for this Court's decision in *Milliken I* is even stronger in this case and the Court of Appeals' decision is in direct conflict with *Milliken I*.

II.

The court of appeals' decision affirming the District Court's Order of July 2, 1980, ordering the state to participate in an inter-district remedy contrary to state constitutional and statutory provisions and its current governmental structure based only on an intra-district violation is in conflict with this court's decision in Hills v. Gautreaux.

As previously noted in I, *supra*, the Court of Appeals has relied upon *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) to support the inter-district remedy in the District Court's Order of July 2, 1981. However, petitioners submit that nothing in *Hills, supra*, suggests that this Court's decision in *Milliken I* has been modified. On the contrary, language in *Hills, supra*, serves to affirm *Milliken I, supra*, and its principles:

> "[T]he Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitation on the remedial powers of the federal courts to restructure the operation of local *and state governmental entities*. That power is not plenary. It 'may be exercised "only on the basis of a constitutional violation." ' . . ." *Id.* at 293. (Emphasis added.)

As this Court pointed out in *Hills, supra*, "the Milliken decision was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases . . . ." *Id.* at 294. This Court reversed the Court of Appeals in *Milliken I* "holding that the multidistrict remedy contemplated by the desegregation order was an erroneous exercise of the equitable authority of the federal court." *Id.* at 293. Thus, rather than modifying *Milliken I, supra*, the decision in *Hills, supra*, affirms the basic principles of *Milliken I* and the equitable power of federal courts. However, the Court of Appeals has ignored

Milliken I, supra, as outlined above and seeks to expand this Court's decision in *Hills, supra.* Thus, a significant question is presented to this Court as to the applicability of *Hills, supra,* a housing case to a school desegregation case. Further, does *Hills, supra,* modify *Milliken I* or stand alone based on its own facts? Petitioners believe the latter position is supported by this Court's language in *Hills, supra,* as set out above. However, because of the reliance of the Court of Appeals and other parties on *Hills, supra,* this Court should address this issue.

For *Hills, supra,* to be applicable to this case, we must examine the appropriate factual determination in *Hills, supra,* which permitted the imposition of an inter-district remedy. First, there can be no question that both the Department of Housing and Urban Development (HUD), and the Chicago Housing Authority (CHA) were found to have engaged in discriminatory conduct through housing practices within the city limits of Chicago. Similarly, for the present, both the City Board and the petitioners, State of Missouri have been found to have failed to dismantle the dual system which existed in Missouri prior to *Brown* v. *The Board of Education of Topeka,* 347 U.S. 483, (1954). However, petitioners respectfully submit that there is no other similarity in the factual findings of *Hills, supra,* and this case. Petitioners have not been found to have committed intentional segregative acts as was the case in *Milliken I, supra,* and *Hills, supra,* and as required under both *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977). Further, this Court in *Hills, supra,* said: "The question presented in this case concerns only the authority of the District Court to order HUD to take remedial action outside the city limits of Chicago." *Id.* at 196. In answering this question the Court did so "because both CHA and HUD have the

authority to operate outside the Chicago city limits''. *Id.* at 298. In support of this position footnotes 13, 14, and 15 in *Hills, supra,* set out the factual basis for such a finding. Unlike *Hills, supra,* the authority of City Board and petitioners over education in the suburban school districts is even more restrictive than is the State's authority in *Milliken I.* See IV, *infra,* and Appendix I. Thus, to order implementation of the 12(a) inter-district plan challenged herein requires the petitioners (specifically the State Board of Education) to engage in numerous activities for which it has no constitutional or statutory authority:

(1) Fund transportation costs one hundred percent (100%) for all inter-district transfers.

(2) Fund one hundred percent (100%) all operating costs for magnet schools established within the City of St. Louis for inter-district transfers.

(3) Establish and fund one hundred percent (100%) all magnet schools established in suburban school districts for inter-district transfers.

(4) Pay state aid at fifty percent (50%) of normal state aid to all home districts transferring students to other districts, even though the home district no longer educates the students.

(5) Pay all instructional costs up to $1250 to and fifty percent (50%) of instructional costs over $1250 to each district participating in the inter-district plan, for eac hstudent transferring.

Thus, to deny this petition would require petitioners to substantially alter their governmental structure without the necessary finding of an inter-district violation with a significant segregative effect as required by *Milliken I.*

Further, *Hills, supra,* found "The relevant geographic area for purposes of the respondents' housing options is

the Chicago Housing Market not the Chicago city limits". *Id.* at 299. However, while a family or individual may live wherever they choose regardless of where they work, generally they must attend the public school system serving their neighborhood unless they choose private education. Therein lies another significant difference between *Hills, supra,* a housing discrimination case and this case, an educational segregation case. Petitioners respectfully submit therefore that the significant facts in this case are substantially different so as to make *Hills, supra,* inapplicable to support a 12(a) inter-district remedy as challenged herein. To permit the Court of Appeals' decision to stand permits a remedy in conflict with *Milliken I* and beyond the scope of *Hills, supra.*

III.

The Court of appeals mandate of February 25, 1982, affirming the District Court's Order of June 11, 1981, ordering a 12(b) inter-district vocational education remedy is:

A) IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *KEYES, ET AL.* V. *SCHOOL DISTRICT NO. 1* BECAUSE IT BASES LIABILITY OF A SCHOOL DISTRICT ESTABLISHED AFTER *BROWN* V. *BOARD OF EDUCATION,* AND NOT PART OF A MANDATE DE JURE SYSTEM, ON THE AFFIRMATIVE DUTY STANDARD ESTABLISHED IN THIS COURT'S DECISION IN *GREEN* V. *COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA.*

B) CLEARLY ERRONEOUS AND UNSUPPORTED BY THE FACTS AND LAW.

C) IN DIRECT CONFLICT WITH THIS COURT'S

DECISION IN *UNITED STATES* V. *ARMOUR & CO.*, BECAUSE IT MODIFIES A CONSENT DECREE BEYOND THE FOUR CORNERS OF THE INSTRUMENT CONTRARY TO THE AGREEMENT OF THE PARTIES AND WITHOUT NOTICE AND HEARING.

A.

With regard to vocational education, attached hereto are Stipulations and Supplementary Stipulation of Facts as Appendix K and Appendix L, respectively. It is important to point out that vocational education training is not required for secondary graduation in Missouri (K-Stip. 1) In addition, a student may obtain vocational education training from his comprehensive high school and cannot be required to attend an Area Vocation School. (AVS) (K-Stip. 5)

First of all, for the reasons set out in I and II, *supra*, *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*), and *Hills* v. *Gautreaux*, 425 U.S. 282 (1976), are inapplicable to support the 12(b) inter-district remedy ordered by the District Court on June 11, 1981. No inter-district allegations were ever filed and proved against either the petitioners or the Special District showing an inter-district violation and an inter-district effect. In addition, the Special District was established by a vote of the people in 1957 as a result of enabling legislation passed by the Missouri General Assembly. The Special District was not part of the dual system mandated by Missouri constitutional and statutory provisions prior to 1954 and was not in existence at the time of this Court's decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954) (*Brown I*). *Thus, an extremely important question is raised as to the desegregation standard to be applied to school districts created after Brown I, supra.* Petitioners

submit that neither they nor the Special District are under the "affirmative duty" called for by *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968). There is no intra-district allegation or finding of liability with regard to the Special District. In addition, *Green, supra,* was an intra-district case and the requirement of an "affirmative duty" has not yet been applied to inter-district litigation by this Court. Finally, since the Special District was never part of any dejure segregated system the standard for determining liability with regard to its establishment or operation is set out by this Court as follows:

> "Our decision last Term in Washington v. Davis, 426 US 229, 48 L Ed 2d 597, 96 S Ct 2040 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' Id. at 242, 48 L Ed 2d 597, 96 S Ct 2040. *Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . .*" (Emphasis added.) *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252, 264-265 (1977).

In addition, in *Keyes, et al.* v. *School District No. 1*, 413 U.S. 189 (1973), this Court established the element of dejure segregation as "a current condition of segregation resulting from intentional state action." *Id.* at 205.

> "[T]he differentiating factor between dejure segregation and so-called defacto segregation . . . is *purpose* or *intent* to segregate." *Id.* at 208.

No such finding of purpose or intent is found in the record. Thus, to permit the Court of Appeals decision to stand is to establish a standard for desegregation never

sanctioned by this Court and clearly in conflict with its prior decisions. Such a significant and important issue surely justifies granting certiorari to allow this Court to establish the standard of desegregation for school districts created after *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and not part of a dejure mandated school system.

B.

In *Liddell* v. *Board of Education*, 491 F.Supp. 351 (E.D.Mo. 1981), the District Court made the following finding:

> "17. The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound nor administratively efficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." *Id.* at 358.

This is the only finding relative to liability and as will be shown is clearly erroneous and unsupported by the facts and law.

In the first place, the Special District has never had its day in court and a full trial on the merits as to the existence of its liability, if any. The Special District was not added as a party defendant until September 12, 1980, pursuant to a motion filed by Caldwell Plaintiffs (L-Stip. 8). In the District Court's Order of December 19, 1980, Judge Meredith declared "the Special District can rest assured that before any action is taken that would effect

it, it would have ample time to be heard". This position of the District Court was affirmed in the slip opinion of the Court of Appeals entered in March 19, 1981, in *Liddell* v. *Board of Education*, No. 80-1458 (8th Cir. March 19, 1981), at p. 10, in which the court stated:

> "No action has or will be taken until a hearing has been held during which the [Special District] will have ample opportunity to be heard."

Finally, on April 21, 1981, the District Court forwarded to all counsel of record a tentative agenda suggested for the May 11, 1981, hearing including the following:

> "1. Whether constitutional liability has been established so as to justify consolidation or merger of city and county SSD-vocational school programs under paragraph 12(b)."

No such hearing was ever held as the record shows and thus no liability has attached specifically to the Special District to justify the implementation of this 12(b) inter-district vocational education remedy as ordered by the District Court on June 11, 1981. Thus, to support such a remedy there must have been an inter-district finding against the State or the consent decree challenged herein must be shown to be valid. Any other decision is in direct conflict with this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

As pointed out in A, *supra*, the Special District was not established by the State of Missouri. It was established by a vote of the people of St. Louis County in 1957 for the purpose of serving the special education needs of children in St. Louis County (K-Stip 17). Without that vote of the people, the Special District of St. Louis County

would not be in existence today and would not be in the position to have been designated an AVS. Neither did the State of Missouri establish an AVS in the Special District or with the City Board. The AVS status that was designated by the State Board was a result of a request originated by the Special District and the City Board (K-Stip. 19). Without the origination of that request from both the Special District and the City Board an AVS designation would not have been possible under Missouri law. The AVS designation must originate with the school district involved and only then may that designation be possible. Again, the designation of the Special District as an AVS was a result of the vote of the people of the Special District of St. Louis County to expand their educational offering from special education to include vocational education. Had either the City Board or the Special District desired to serve as the AVS for the entire metropolitan area, that request could have been made to the State Board. However, no such request originated from the individual school districts and no power existed beyond that for the State Board to establish an AVS for the metropolitan area. Thus, the finding that the State of Missouri established an AVS in both the Special District and the City Board is clearly erroneous and does not support the 12(b) order entered on July 11, 1981.

Neither, does Missouri law support the finding of the District Court in finding 17 cited above that the State of Missouri has power to merge the Special District and the City Board. In fact, Missouri law as interpreted by the Missouri Supreme Court makes it abundantly clear that such a position is clearly erroneous. Art. III, § 40, of the Missouri Constitution states that the General Assembly shall not pass any local or special law:

> "(20) creating new townships or changing the boundaries of townships or school districts;

"(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;

* * *

"(24) Regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes. . . ."

Thus, petitioners respectfully submit that these provisions make it clear no law applying to a specified school district or districts which would merge or change the boundaries of the school districts is permissible under the Missouri Constitution. Since it is prohibited by the Constitution, it obviously cannot be accomplished by statute.

An examination of the powers of the State Board in the Missouri Constitution and statutes makes clear that it has no power to change school district boundaries. Art. IX, § 2(a), states that the supervision of instruction in the public schools shall be vested in the State Board, and Art. IX, § 2(b), states that the State Board is granted the power to appoint a commissioner of education as the chief administrative officer. However, neither article contains any suggestion that the State Board or commissioner have power to change or merge school district boundaries.

In addition, an examination of Chapters 161 and 162 of the Missouri statutes finds no support for the District Court's finding that the State has the power to merge the Special District and the City Board. Petitioners respectfully submit that the authority to change school district lines in any fashion rests with the *voters* of the school districts in question and those *voters* alone. This is the law in the State of Missouri and apparently has been so for some time. In *State ex rel. McIntosh* v. *Rainey*, 397 S.W.2d 344, 346 (Mo.App., St.L.D. 1965), the court took the position that it was "not the function of the court to pass upon the

necessity for any change in the school boundaries". Even though § 165.170 is no longer in existence, the most definitive language by the courts of Missouri relative to school district boundaries appears in *England* v. *Eckley*, 330 S.W.2d 738, 741 (Mo. banc 1959), wherein the court stated:

> "[S]ection 165.170 and its predecessors (applicable to common school districts) have, in substance, authorized: the formation of a new district from two or more district (or parts thereof), the division of a district into two districts, and changes in the boundary lines between two or more districts. This procedure has always required a vote of the citizens of the districts involved, after petition filed, and some form of arbitration in the event of disagreement between the districts."

The court in *England, supra,* also erased any doubts as to how long this process has been in effect:

> "The legislature has thus created a method for 'change of boundaries' which has existed, in one form or another, for approximately eighty-five years." *Id.* at 744.

Accordingly, petitioners respectfully submit that they do not have the authority to merge the Special District with the City Board and that said finding of the District Court is clearly erroneous.

C.

If the 12(b) inter-district vocational education remedy is to stand, it must stand because the consent decree entered into by the parties is valid. As shown in A and B, *supra* there is no other basis on the record to support such an order absent a valid consent decree. To suggest otherwise is in conflict with *Milliken I* and *Hills, supra.* Petitioners respectfully submit that the Court's decision

specifically rejecting the consent decree and adding additional provisions to it without approval of the parties and in particular the petitioners, results in an abrogation of that consent decree and relieves the parties from responsibility thereunder. The consent decree in question was filed on May 21, 1981, and signed by five parties to the litigation. However, the District Court in its Order of June 11, 1981, specifically rejected the consent decree:

> "Notwithstanding the holding in *Miami* on which rehearing was granted, the Court is reluctant under circumstances here to enter an order and judgment as a 'consent decree.' Not all of the parties have consented to the decree, although it has been approved by a majority thereof. The plan has been approved by all of the parties except intervening plaintiffs, Adams. Therefore, the Court hereby adopts the Vocational Education Plan agreed to by seven of the eight parties as its plan to desegregate the vocational schools in the City of St. Louis and St. Louis County. The plan is attached hereto and made a part of this order." (A-49).

Accordingly, petitioners submit that the consent decree has been abrogated by the District Court's order of June 11, 1981, and without judicial approval, none of the parties to said consent decree are bound by it. In addition, the District Court attempted to modify the consent decree by adding provisions in its order of June 11, 1981, not contained in the consent decree. One of the most significant provisions, places upon the petitioners a substantial burden for funding the entire plan, a burden which they have never agreed to. In addition, the modifications were recommended by City Board and Liddell Plaintiffs and were the modifications which petitioners consistently opposed. To the extent the District Court has attempted to expand or to contract the consent decree in question, such

attempts are beyond the District Court's authority and not binding on the parties to said consent decree.

A court has jurisdiction to approve or reject a consent decree and nothing more. Once the court decides to reject a consent decree, as done here by the District Court, the next procedural step should be a trial on the merits. As stated in *United States* v. *Armour & Company*, 402 U.S. 673 (1971):

> "[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and theories in litigation." *Id.* at 682.

Thus, petitioners submit that neither the funding amendments of City Board or the amendments of Liddell Plaintiffs which were adopted by the District Court in its order of June 11, 1981, are of any legal force and the order itself is in direct conflict with *United States, supra.* In addition, since the consent decree "must be construed as written" attempts to modify it without a full hearing must fail, or be in direct conflict with *United States, supra.*

It should also be pointed out that the District Court's order of June 11, 1981 was a final order and appealable. The Court of Appeals order December 2, 1981 dismissing petitioners appeal is erroneous, especially in light of the rejection of the consent decree.

Finally, to permit this order to stand will seriously inhibit future consent decrees by parties inclined toward

settlement. Parties must be assured that when they enter into a consent decree it will stand as written. They should not fear that once signed it will immediately be changed to serve the interests of the court of the parties. Having given up the right to full hearing, once a consent decree is rejected by the court, as in this case, the parties to the consent decree should be secure in the knowledge that a full hearing will ensue. To permit otherwise would make consent decrees a thing of the past and no longer a useful tool of the courts in disposing of litigation. For this important reason certiorari is appropriate to review the consent decree herein and the manner in which it was handled.

IV.

The lack of procedural due process is so grossly unjust and extremely unfair as to urgently call for the exercise of this court's supervisory powers because petitioners had no notice their liability was at issue and no pleadings were filed against them to which they could respond.

Initially, petitioners would suggest that this case is a landmark case for procedural chaos and for the total lack of procedural due process granted to petitioners. Petitioners have little doubt that if the defendant was an individual, especially a minority, neither this Court nor the Court of Appeals would have permitted the procedural aspects of this case to proceed as they have. The fact that the petitioners (principal defendants) are in effect the people of Missouri, who must bear the cost of any alleged violation, though not personally responsible, does not lessen their procedural rights as a matter of law and should not lessen those rights as a matter of fact. Yet, that is precisely what has happened to date as the following chronology and law will indicate. Petitioners offer no citations in support of this reason for granting the writ. First, the requirements of notice and the right to defend against charges are so

deeply entrenched in our system of justice that case citations which are obviously abundant, are of little importance when those rights have been denied as they have here. Secondly, petitioners are unable to find any case in point where procedural due process has been so flagrantly violated.

Assuming, *arguendo,* a violation may be found, this does not justify a denial of the procedural due process guaranteed by our constitution. It is one thing to reach a determination of liability after a full liability hearing in which all defendants have their day in court and an opportunity to present whatever defenses they may possess. However, it is quite another thing when that finding of liability is reached without any allegation against the defendant and there is no opportunity to defend against such unknown and phantom charges. Yet that is precisely what has been permitted here. The original Liddell complaint was filed on February 18, 1972, with allegations against City Board, then the only named defendant. Subsequently, the NAACP (Caldwell Plaintiffs), the United States, the City of St. Louis and the Adams group intervened as plaintiffs but no new allegations were filed against either City Board or petitioners. In 1977 the State of Missouri, the Commissioner of Education and the State Board and its individual members were added as defendants. However, no new allegations were filed by any of the parties against petitioners and the only pleadings pending alleged intra-district discriminatory conduct by the City Board only. A sixteen week trial ensued in 1977 and 1978, resulting in the District Court's decision on April 12, 1979, which found that the City Board had disestablished the former dual school system. Still no allegations or pleadings were filed against any of the petitioners and the record is devoid of any written, oral or implied consent to have petitioners' liability determined.

This quasi party or amicus status seemed to find support in the Court of Appeals' decision of March 3, 1980, reversing the District Court's finding as to the City Board. *Adams* v. *United States*, 620 F.2d 1277 (1980). In *Adams, supra,* the Court of Appeals stated:

> "The principal issues on appeal are: (1) whether the Board effectively desegregated the school system in 1954-1956 by adopting and implementing its neighborhood school plan; (2) whether Board policies or actions since that date have contributed to the present segregated condition of the school system; (3) what policies and actions must now be taken to integrate the St. Louis elementary and secondary schools; and (4) whether certain appellants should be awarded attorney fees." *Id.* at 1284.

Thus, no issue on appeal as framed by the Court of Appeals itself, was directed at petitioners. It would seem academic that if no issue relates to a defendant, then the decision of the lower court must be affirmed as to them. This position finds further support in the body of the Court of Appeals opinion which after a brief historical background is directed at City Board activities in the field of public education. At no time does the Court of Appeals direct its inquiry toward petitioners or make any specific finding concerning petitioners alleged failure to dismantle the dual system or petitioners alleged discriminatory conduct in public education. Finally, in devising a remedy the Court of Appeals placed that responsibility on City Board and not on petitioners, who are not required to do anything. In fact, portions of the remedy ordered by the Court of Appeals are totally inconsistent with a finding of State liability:

> "c. . . . It (City Board) shall seek the help of the state and federal governments in financing them. . . .
>
> • • •

> "(3) . . . The Board shall seek the cooperation of such school districts, the State Board of Education and the United States in developing and implementing such a plan. (citations omitted.)" *Id.* at 1296.

Thus, rather than being found liable and ordered to participate in a remedy, petitioners were placed in the same category as the United States which was a plaintiff-intervenor, and suburban school districts, which were not even parties. The average person, lawyer or lay person, could come to only one reasonable conclusion about this decision—the State was not liable for any constitutional violations.

On remand, a remedy hearing was held for several days pursuant to the Court of Appeals' mandate. Again, no new allegations were filed and petitioners still had no charges to respond to. Nonetheless, at the conclusion of the remedy hearing, the District Court entered its Order of May 21, 1980, finding, *inter alia*, the State as the primary constitutional wrongdoer. Thus, eight years after the case began, without allegations against them, without notice and without an opportunity to defend against anything, and after apparently having been exonerated by both the District Court and the Court of Appeals, the petitioners stood liable for unknown charges. In July, 1980, the final procedural irony from petitioners' point of view took place, the Governor, Attorney General, Treasurer and Commissioner of Administration were added as party defendants, after two principle District Court decisions and one principle appellate decision.

On appeal, the District Court's Order of May 21, 1980, was affirmed by the Court of Appeals and certiorari was denied by this Court, all without the State of Missouri, its elected and appointed officials and its citizens ever having their day in court. A major issue on appeal was

petitioners position that the Court of Appeals, in *Adams, supra,* had affirmed the District Court's finding that petitioners had met their constitutional duty. However, the Court of Appeals rejected this argument citing only Footnote 28 in *Adams, supra,* in support of its position:

> "28. The costs of the plan shall be apportioned among the defendants as determined by the district court. See Part VI of this opinion." *Id.* at 1295.

Part VI is entitled Other Factors Contributing to Segregation, where the Court of Appeals specifically rejected the District Court's finding concerning demographic changes caused by "discriminatory housing, urban renewal and highway land acquisition policies of the federal government; state laws and policies mandating discrimination in housing . . ." *Id.* at 1291, and said:

> "If the Board had dealt with the problem in 1954-1956 and had implemented a plan for integrating the schools in North and South St. Louis, we would have a different case today. . . ." *Id.* at 1291.

The Court of Appeals then recognized "that many of the factors cited by the court, including actions of the state and federal governments, have intensified racial segregation in North St. Louis." *Id.* at 1291. Thus, once again petitioners find themselves categorized with the United States, a plaintiff-intervenor. At no time does the Court of Appeals find the petitioners failed to meet their "affirmative duty", if any, per *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430 (1968), or that petitioners had acted with purpose or intent to segregate as called for by *Keyes, et al.* v. *School District No. 1,* 413 U.S. 189, and other decisions of this Court. Petitioners respectfully submit that if there were ever a case crying out for the supervisory powers of this Court, it is *Liddell.* Order must be brought from chaos and only this Court has

the power and will necessary to accomplish this. It is abundantly clear that neither the District Court nor the Court of Appeals is willing to restore order to this case and at least permit the petitioners their day in court. Justice demands that right and this Court should permit nothing less.

In closing, petitioners naturally believe in their ability to successfully defend this case. As an example petitioners can show, if given the opportunity, that on May 25, 1954, one day after this Court's decision in *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (*Brown I*), the Commissioner of Education requested an Attorney General's opinion concerning the validity of existing state constitutional and statutory provisions mandating a dual school system. On June 30, 1954, the Attorney General responded and since that date neither constitutional nor statutory provisions mandating the dual system have been enforced. The success of the State of Missouri in desegregating even received favorable national attention in a Time magazine article asserting that within one year of *Brown, supra,* 80% of the schools in Missouri were desegregated. Naturally, plaintiffs will claim evidence to rebut or overcome the aforesaid evidence and petitioners have additional evidence to present. Unfortunately, this will never be permitted in this case unless this Court grants certiorari. Liability will stand determined, based on a shoddy record and without petitioners ever having their day in court. Regardless of the ultimate trial decision, if petitioners at least have an opportunity to defend themselves and the citizens of the State of Missouri, justice will have been served.

Petitioners recognize this Court seldom grants certiorari based on an exercise of its supervisory power. However, this case is so unfair and unjust in its denial of due process that the actual judgment of the court pales in com-

parison. The credibility of the judiciary has been sorely strained by the procedural handling of this case and this Court has the authority, to step in and correct the errors and injustice of the past. *In this regard, this Court is empowered to grant certiorari solely for the purpose of summarily remanding the case to the lower court for a full hearing on state liability. To do so would permit this Court to defer the other important constitutional questions raised herein, until the procedural aspects of this case are corrected, and more importantly restore justice and fair play to this case for all to see.*

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit rendered on February 25, 1982.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joana Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Warber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri.

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"
United States of America,

Appellee,

v.

No. 80-1458

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary),

Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams, Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens committee"

United States of America,

Appellee,

v.

No. 80-1494

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L.

Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellant.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela

Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

No. 80-1531
Appeals from the United States District Court for the Eastern District of Missouri.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr. Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Nat-

ural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1599

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,
Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next

Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1735

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Submitted: November 13, 1980

Filed: February 13, 1981

Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

We are asked by the State of Missouri and by three groups of parents to set aside the plan of the United States District Court for the Eastern District of Missouri

for integrating the public schools of St. Louis. The State argues that it has been required to pay too much toward the integration plan and that it should not be ordered to participate in developing either a voluntary or an involuntary inter-district integration program. The white parent group complains that the district court plan goes too far and is unfair to white students. The black parent groups assert that the plan doesn't go far enough in that it leaves some schools in North St. Louis all black. All of the appellants assert that the district court erred in failing to find that the United States contributed to the segregation of the St. Louis school district and to require it to pay a substantial portion of the cost of integrating the school system.

We affirm the decision of the district court. The desegregation plan was designed in accordance with the letter and spirit of the mandate of this Court and it meets constitutional requirements. If the plan is fully implemented in the same spirit and with the continuing cooperation of parents, students, teachers and community and religious leaders, a firm foundation will have been laid for affording the children of St. Louis a quality education in a racially neutral school system.

We take judicial notice of the facts that the Board of Education and one of the parent groups have filed amended complaints in the district court, asking the court to require inter-district integration with the schools of St. Louis, St. Charles and Jefferson Counties. We express no opinion as to the merits of the proposed amendments. We do, however, emphasize that the pendency of these petitions must not be permitted to delay the full and complete implementation of every feature of the plan developed by the district court and approved by this Court, including those sections of the plan that relate to inter-district integration.

I.

This case, filed in district court in 1972, is before this Court for the third time.[1] When it was first here, we remanded it with directions to permit the Caldwell parent group to intervene as plaintiffs. *See Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977). When it was next here, we reversed the district court, concluding that the plaintiffs had clearly proven that the defendants had established and maintained a racially segregated school system in violation of the plaintiffs' constitutional rights. *See Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980). We remanded the case to the district court with the following admonition:

> Segregation in the elementary and secondary schools in St. Louis must now be eliminated. An integrated system must be devised and implemented promptly. In no other way can the constitutional right to an equal educational opportunity be assured to all children of St. Louis. With careful planning, expert advice, broad community participation and good faith, a plan to integrate the schools can be devised and implemented which will meet constitutional requirements.

Id. at 1291-1292.

Only one party—the Adams plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

On remand, the district court made every effort to comply with our charge. It established an interracial citizen's advisory committee to promote community involve-

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[1]For a detailed account of the procedural history of this case, *see Adams v. United States*, 620 F.2d 1277, 1281-1284 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88, 66 L.Ed.2d 29 (1980).

ment in the proceedings, it appointed Dr. Gary Allen Orfield to provide expert assistance in the preparation of a desegregation plan; it held extensive evidentiary hearings on proposed plans and the procedures involved in implementing them; and after a careful consideration of all the evidence, it approved a comprehensive desegregation plan to be effective at the start of the 1980-1981 school year. *See Liddell* v. *Board of Educ.*, 491 F.Supp. 351 (E.D. Mo. 1980).

II.

The plan approved by the district court is a modified form of the "Orfield approach" sanctioned by this Court in the previous appeal. *See Adams* v. *United States, supra,* 620 F.2d at 1293-1296. The essential elements of the plan include (1) reassigning students to achieve the greatest possible number of desegregated schools (defined as 30-50% black); (2) establishing magnet and alternative schools designed to attract students of all races from throughout the St. Louis area; (3) organizing a middle school system to facilitate clustering, pairing and other integrative efforts; (4) instituting and expanding specialty and part-time integrated programs; (5) facilitating permissive integrative transfers; (6) initiating cooperative inter-district desegregation programs; (7) providing for integration of and special training for school personnel; and (8) developing a comprehensive community relations program.

Although the plan reflects the fact that it is not possible to fully integrate every school in the St. Louis system, the district court faithfully followed the directions of this Court by providing a variety of integrative experiences and enhanced educational opportunities for students remaining in the predominately black schools.

The district court estimated that the overall cost of

the desegregation plan would be approximately $22.1 million. The court directed the State of Missouri to pay one-half of the actual cost of desegregation. To finance the remaining 50%, the court ordered the Board of Education to transfer approximately $4.7 million out of its debt retirement account, noting that federal funds would cover the balance. Federal funding to assist in the integration process exceeded $7 million for the 1980-1981 school year.

III.

Four parties—the Liddell plaintiffs, the Caldwell plaintiffs, the Adams plaintiffs, and the State of Missouri defendants[2]—appeal from the district court's order approving the desegregation plan. For convenience, the issues on appeal may be divided into two categories: those relating to the design of the plan and those relating to the financing of the plan. We first consider the challenges to the design of the plan.

A. *Design*

1. The Liddell and Caldwell plaintiffs contend that the plan approved by the district court is constitutionally deficient because it does not go far enough to remedy the effects of the defendants' discriminatory practices. Specifically, they argue that the district court erred in holding that schools with 30-50% black enrollments were to be considered integrated. Their position appears to be that the only constitutionally permissible means of integrating the St. Louis system was to reassign students so

[2]The "State defendants" include the State of Missouri and its Board of Education, as well as the following Missouri officials: the Governor, the Attorney General, the Treasurer, the Commissioner of Education, the Commissioner of Administration, and the individual members of the Missouri Board of Education. Because their interests are identical and they have filed a joint brief, we refer to these parties collectively as the State of Missouri.

that each school had the same racial mix as the district as a whole—approximately 76% black and 24% white.

We cannot agree that the options available to the district court were so limited. In our decision of March 3, 1980, we specifically stated that a plan similar to the one adopted by the district court would meet constitutional requirements. In so doing, we accept the testimony of Dr. Orfield that such a plan would have the best chance of successfully integrating the St. Louis schools and stabilizing neighborhoods already integrated.

In affirming this aspect of the plan, we emphasize that students remaining in the predominately black schools in St. Louis are not left completely untouched by the new system. Provisions affecting the remaining black schools include magnet and alternative programs, new and expanded specialty programs, permissive intra-district transfers, staff desegregation, staff development, a City/County integrated vocational program, and voluntary pupil exchanges with suburban school districts. We also emphasize that the plan requires the Board of Education to spend a substantial portion of the $22 million desegregation budget to improve the quality of education in those schools that remain all black and continuing expenditures are required for this purpose. Moreover, although a number of all-black or virtually all-black schools remain in St. Louis under the plan, the new system does eliminate the all-white schools from the district. Thus, although the degree of actual integration achieved under the plan is not optimal, we reiterate our view that under all the circumstances, the plan is a constitutional one and has a better chance of providing a quality integrated education for the school children of St. Louis than any of the other plans that were presented by the parties to this lawsuit.[3]

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[3]We note that the plan approved by the district court appears to

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2. In contrast with the position of the Liddell and Caldwell plaintiffs, the Adams plaintiffs argue that the district court has gone too far in the intra-district pupil reassignment portion of its plan.[4] They note that the Court has included in the reassignment plan a number of schools that were between 30 and 50% black prior to desegregation. These schools, they contend, should not have been required to participate in the plan in view of this Court's determination that the boundary lines and assignment patterns for schools with 30-50% black enrollments should remain substantially changed.

This contention is without merit. Although reassignment does affect some schools that had a pre-plan enrollment of 30-50% black, we are satisfied that their inclusion does not violate our order of March 3, 1980. First, it turned out to be necessary to include some of these schools to accommodate the change from a two-tier (kindergarten-8; 9-12) to a three-tier (kindergarten-5; 6-8; 9-12) system, a change that was designed to help facilitate clustering and other integrative efforts and to improve the overall educational opportunities in St. Louis. Second, it appears from the record that many of the schools cited by the appellant as having a pre-plan black population of between 30 and 50% had such a racial mix because students were transported to them, not because the neighborhoods sur-

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Footnote continued

permit up to a 15% deviation from the 30-50% black guideline used to define integrated schools. In our view, a deviation of this magnitude should be permitted only rarely and then only after the court has determined, following a hearing in which the parties are given an opportunity to present their views, that allowing the variance will not impair the overall effectiveness of the desegregation plan.

[4]The Adams group also claims that the Board of Education relied on false enrollment and other data in developing the plan. Although there may be minor discrepancies in some of the figures, we find no support in the record for the appellants' position that the information relied upon was so inaccurate that the plan must be invalidated.

rounding the schools were integrated. Still other schools were included because their black enrollment percentage has increased rapidly in recent years, indicating that their black population would be likely to exceed 50% in the near future. When read in context, it is clear that our decision of March 3 was intended to minimize the transportation of students and to encourage the development and maintenance of integrated schools in integrated neighborhoods. In our view, the plan approved by the district court is faithful to this concept.

3. The State of Missouri is the sole challenger to paragraph 12 of the district court's order, which provides for various forms of inter-district relief. The State argues that the district court is without authority to order the preparation of any inter-district plan unless and until the suburban districts are joined as parties to the lawsuit. The Adams group, by contrast, argues that the court erred in not developing a more comprehensive inter-district remedy.

Paragraph 12 of the district court's order provides in part:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

491 F.Supp. at 353.

The appellees contend that this Court should not hear the State's challenge at this time because the directives contained in paragraph 12 are neither final judgments appealable under 28 U.S.C. § 1291 nor order granting or denying injunctive relief appealable under 28 U.S.C. § 1292. Although the line between appealable and nonappealable orders is rarely clear in a case in which the district court retains jurisdiction over a developing desegregation plan, we are persuaded that we have jurisdiction over these issues in this appeal.[5] Accordingly, we consider the chal-

[5]In support of their position that the provisions of paragraph 12 are nonappealable, the appellees cite to cases in which appeals courts ruled that orders directing school boards to formulate desegregation plans were nonappealable. *See Bradley v. Milliken*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972); *Taylor v. Board of Educ.*, 288 F.2d 600 (2d Cir. 1961). The State of Missouri distinguishes the cases cited by the appellees by noting that the school board in each of those cases was ordered to prepare a remedy consistent with its judicially determined constitutional liability. Here, the State argues, the district court exceeded its jurisdiction by ordering the parties to prepare a plan involving other school districts, even though it is conceded that the suburban districts cannot be considered to be constitutional violators unless and until they

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lenge to paragraph 12 on the merits, examining each section of the paragraph separately.

Section (a) of paragraph 12 directs the parties to "make every feasible effort" to work out a voluntary plan of inter-district pupil exchanges to be implemented in the 1980-1981 school year. Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up. Under the terms of the order, the plan is to be designed to "assist in alleviating the school segregation in the City of St. Louis [and to ensure] that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.supp. at 353. Thus, the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City.

Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." 491 F.Supp. at 358. Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit. We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year.

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are joined as parties to the litigation. While the question is not free from doubt, we are satisfied that we have jurisdiction to hear an appeal from a remedial order that, on its face, arguably involves potential parties who have not yet had their day in court.

Section (c) of paragraph 12 is also within the authority of the district court. By its terms, that section required the parties to develop and submit to the court by November 15, 1980, a "suggested" inter-district plan "to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County." We must read the term "government-imposed" to mean "found to be government-imposed by a court." Therefore, to the extent that the segregation was imposed by County school districts which are not parties to the lawsuit and which have not been designated as constitutional violators, it cannot be considered to be "government-imposed." But, to the extent any such segregation was imposed by the State or other defendants, and to the extent those defendants have the power to remedy the violation, it is proper for the district court to order them to take steps to do so.

Furthermore, we recognize that the Board of Education and the Caldwell plaintiffs have petitioned the district court to amend their complaints to add as parties defendant the school districts in the three-county area surrounding the City of St. Louis. We express no opinion on the merits of those motions, but we emphasize that the current parties have a responsibility to comply with the terms of the district court order, including the provisions of paragraph 12, regardless of the disposition of the motions pending before the district court.[6]

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[6]We note that the district court has found it necessary to extend the deadlines for filing the proposed plans under paragraph 12(a)-(c) and that it is apparently having some difficulty in getting complete and adequate proposals from the parties. We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop and implement the plans contemplated by paragraph 12. It is imperative that the district court countenance no excuse for further delay.

4. The Adams and the Liddell plaintiffs maintain that the district court erred in approving the personnel assignment portion of the desegregation plan. Both appellants oppose the court's adoption of a "Singleton" plan of personnel assignment, which provides that the black to white staff ratio in each school is to be substantially equal to the district-wide black to white staff ratio. They argue that the Singleton formula is inconsistent with the following directive of this Court: "The consent decree, insofar as it pertains to faculty integration, shall be fully implemented and additional steps taken to ensure that school personnel at every level will be integrated." *Adams* v. *United States, supra,* 620 F.2d at 1297. In our view, the plan approved by the district court goes beyond what we required, at least with respect to classroom teachers. We will not quarrel with that decision.

The Liddell and Adams groups argue that the personnel integration provision of the plan is inadequate because it fails to integrate the administrative staff. The district court's order provided that a Singleton assignment formula should apply to "[a]ll principals, teachers, and other certified staff who work directly with children at a school." 491 F.2d at 354. The court also stated, "The same criteria shall apply to non-certificated personnel." *Id.* We read these statements to provide that the Singleton assignment scheme is to apply to *all* principals, *all* teachers and *all* non-certificated personnel, as well as to certificated staff members who work directly with children. It appears that nothing is said about administrators other than principals. That is not surprising, inasmuch as the Singleton approach matches district-wide race ratios with staff ratios at each school. There is no way, therefore, to apply that formula directly to administrators who are not assigned to specific schools. We assume that as to such personnel, the prior directive of this Court will be fol-

lowed, and are confident that if that phase of the plan has not yet been implemented, it will be by the opening of the 1981-1982 school years.

5. The Adams and Liddell plaintiffs also join in challenging the manner in which the burdens of desegregation are distributed among the students. The Adams group contends that the burdens are borne disproportionately by the white students, while the Liddell group asserts that the black students suffer the greatest adverse effects under the plan.

We find no support in the record for either of these positions. The Adams appellants base their argument on the fact that slightly over one-half of the students transported to schools out of their neighborhoods are white even though white students comprise only 24% of the school population. In our view, that is not sufficient to show that the white students bear a disproportionate burden. In a situation such as that in St. Louis, where it is necessary to exchange black students with white students in order to integrate the schools, the number of whites who are transported will almost necessarily be approximately equal to the number of blacks who are similarly transported. Under these circumstances, the percentage of each race transported is not controlling.

The Adams group also argues that the black students reap a disproportionate amount of the benefits from the plan. That assertion simply has no support in the record.

The basis of the Liddell group's challenge is essentially that some black children remain in predominately black schools under the plan.[7] We have answered that complaint earlier in this opinion.

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[7]The Liddell plaintiffs also assert that the district court violated this Court's mandate by failing to establish an educational park in the

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6. The Caldwell group raises two issues concerning the composition and operation of the citizens' committees appointed by the district court. In our March 3 opinion, we stated,

> The Board of Education is to be given the principal responsibility for developing and implementing a comprehensive plan to integrate the school system. In fulfilling this responsibility, the Board shall work with the parties of this lawsuit, a broadly based interracial committee to be named by the district court and an expert, or experts, to be named by the district court.

Adams v. *United States, supra,* 620 F.2d at 1295 (footnote omitted).

In accordance with this directive, the district court appointed a twenty-member bi-racial "Citizens' Committee" to assist the Board of Education in developing the desegregation plan. The members of the Citizens' Committee were chosen from lists provided by the parties; four of the twenty members were selected from the list submitted by the Caldwell plaintiffs. Following approval of the plan, the court disbanded the Citizens' Committee and adopted a new "Desegregation Monitoring and Advisory Committee." The new group was composed of twelve members, one-half of whom were members of the original Citizens' Committee.

The Caldwell plaintiffs assert that they are not adequately represented on this new committee. The record shows, however, that two of the twelve Monitoring Committee members, including the vice chairperson, were

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City of St. Louis. In our March 3 opinion, we did refer to an educational park as one possible method of providing enhanced educational opportunities for St. Louis students. We did not, however, require the district court to establish such a park.

originally nominated for the Citizens' Committee by the Caldwell group. It also shows that six of the twelve members on the Monitoring Committee are black. In light of these facts, no abuse of discretion has been demonstrated.

The Caldwell appellants' second objection to the Monitoring Committee is that the district court erred in expressly authorizing *ex parte*, oral communication between the court and the Monitoring Committee chairperson and vice chairperson. We agree that all parties are entitled to know of the advice given the court by the Committee. *See Bradley* v. *Milliken*, 620 F.2d 1143, 1156-1158 (6th Cir.), *cert. denied*, 101 S.Ct. 207, 66 L.Ed.2d 80 (1980). The best practice would be to reduce to writing all communications between the court and the Committee, make them part of the record, and provide them to counsel for the parties. If oral contact is deemed necessary by the district court, the parties should, where possible, be given notice and opportunity to be present when the oral report is received. To this point, however, no prejudice has been shown from any alleged *ex parte* contacts.

B. *Financing*

1. All four of the appellants join in mounting the primary challenge to the financing of the desegregation plan, arguing that the district court erred in failing to directly order relief against the United States government.[8]

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[8]The claims of the Caldwell appellants go beyond the financial liability of the United States. They maintain that the government should be required to take affirmative steps to reverse the discriminatory effects of federal housing and other policies. This issue has not been tried in this lawsuit. Accordingly, the district court did not err in refusing to grant affirmative relief against the United States.

We note in passing that the district court has taken steps to ensure that federally assisted housing programs are operated so as to aid in the implementation of school desegregation in St. Louis. In paragraph 12(d)

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In support of their position, the appellants point to evidence in the record, as well as to statements of the district court and this Court, indicating that the policies and practices of the federal government have been a significant cause of segregation in the St. Louis school system. The fact remains, however, that no party has named the United States as a defendant and alleged that it engaged in discriminatory practices.[9] The real question, therefore, is whether the district court abused its discretion in refusing to grant the Caldwell plaintiffs' motion to amend its complaint to seek relief against the United States.

Under all the circumstances of this case, we find no abuse of discretion. The Caldwell plaintiffs' motion to amend was filed on May 23, 1980, one week after the district court concluded evidentiary hearings on the proposed desegregation plans. At that time, the district court was operating under a stringent time schedule, mandated by this Court, requiring that the plan be implemented by the beginning of the 1980-1981 school year. Given this need to expedite approval and implementation of the plan and

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of its order, the district court directed the State defendants, the United States and the St. Louis Board of Education

> [t]o develop and submit to the Court by November 1, 1980, in conjunction with the Community Development Agency of the City of St. Louis, a suggested plan for insuring that the operation of federally-assisted housing programs in the St. Louis metropolitan area will facilitate the school desegregation ordered herein.

491 F.Supp. at 354.

No party has challenged this aspect of the district court's order. The parties have submitted plans in accordance with the order, and we approve of this effort to facilitate implementation of the overall desegregation plan.

[9]The Adams plaintiffs did name the United States as a defendant in its complaint in intervention. Rather than complain of the government's segregative acts, however, the Adams group alleged that the United States illegally required the St. Louis school district to take steps to desegregate the schools as a condition to release of federal funds for the district.

the likely delay attendant in adding new theories of liability against a new defendant, we hold that the district court did not abuse its discretion in refusing to grant the Caldwell group's motion to amend at that time.

In affirming the district court's refusal to grant relief against the United States, we are mindful of the significant financial role played by the Federal government in implementing the St. Louis desegregation plan. In its order approving the plan, the district court expressly recognized that a substantial portion of the funding for integration would come from the United States government. The court directed the United States Department of Education to expedite the processing of funding applications for St. Louis under the Emergency School Aid Act (ESAA), 20 U.S.C. § 3191 *et seq.* Apparently, this direction was heeded since the St. Louis school system received over $7 million in ESAA funds—nearly one-third of the desegregation budget—to cover the costs of implementing the plan during the 1980-1981 school year. Moreover, the evidence in the record gives us no reason to believe that similar funding will not be available to continue implementation of the plan for the foreseeable future. Under these circumstances, we are unwilling to hold that the district court erred by failing to expressly order the United States to pay for part of the desegregation plan.

2. The State of Missouri vigorously contends that it should have no part in paying for the costs of integration because its actions did not violate the Constitution. More precisely, the State argues that this Court did not overrule the district court's earlier finding of non-liability on the part of the State. Thus, the State asserts, the district court was precluded on remand from finding the State to be a constitutional violator.

This contention is wholly without merit. In our March

3 opinion, we specifically recognized the causal relationship between the actions of the State of Missouri and the segregation existing in the St. Louis school system. Furthermore, we expressly directed the district court to apportion the costs of the desegregation plan among the defendants. *Adams* v. *United States, supra,* 620 F.2d at 1295 n.28. These statements amount to a clear reversal of the district court's findings concerning the liability of the State, and the State has chosen not to seek review of that decision in the Supreme Court. At the very least, our opinion left the district court free to review its earlier conclusions. We will not disturb its decision to do so.

3. As an alternative argument, the State contends that, even if it was proper to require it to fund part of the plan, it has been ordered to pay too great a share. The State maintains that the amount it has been ordered to pay is not commensurate with the degree of its constitutional violation. In addition, it argues that the desegregation plan budget is inflated and that the State's portion of the funding is too great as a result. We agree with neither contention.

After reviewing the discriminatory action and inaction of the State of Missouri, the district court concluded that "the State defendants stand before this Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty." 491 F.Supp. at 359. This conclusion has ample support in the record; as noted, we recognized as much in the prior appeal. It was well within the discretion of the district court, therefore, to order the State to pay one-half of the costs of integrating the St. Louis school system.

The State's complaints about the desegregation plan budget are that it includes items that are not properly considered part of the integration process and that cer-

tain savings were not taken into account. We need not review the specific items in the plan budget, however, because it is clear that the approved budget is only an estimate of the expected costs of implementing the plan. The district court's order requires the State to pay one-half of the *actual* costs of implementing the desegregation plan; the budget is used only to set a ceiling on the amount of the State's participation. In addition, the district court specifically directed that "continued efforts be made to reduce the actual costs of implementation." 491 F.Supp. at 352.[10]

4. The Adams' plaintiffs contend that the district court erred in directing the Board of Education to transfer approximately $4.6 million in excess funds from its debt retirement account to be used to make the building modifications necessitated by the desegregation plan. This complaint is based on the assertion that the Board of Education was without authority under Missouri law to collect surplus funds in the account reserved for the retirement of bonds. The Board of Education responds that the money in the debt retirement account was collected in accordance with statutory guidelines following annual public hearings, and that no one has complained of the accumulated surplus prior to this time.

We decline to rule on whether Missouri law authorized the Board of Education to accumulate funds in its debt retirement account. This is surely not the most suitable forum for determining the propriety of the Board of Education's bond issues. We are satisfied that the district

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[10]Like the State of Missouri, the Adams appellants contest the validity of the budget on the ground that it includes items not necessary for integration. Inexplicably, the Adams group also takes the seemingly inconsistent position that the amount allocated by the budget is insufficient to desegregate the St. Louis schools. For the reasons stated in the text, we need not decide the validity of these challenges to the budget.

court had discretion to order the transfer of funds already collected and held by the Board.

To summarize, we affirm the judgment of the district court and commend it for the manner and promptness with which it implemented the earlier decision of this Court. We remand the matter to the district court with directions to continue with the implementation of its plan in accordance with the slight modifications made by this opinion. All parties will bear their own costs in this appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willie and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

Appellants,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1458

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secre-

tary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand; on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellees,

City of St. Louis,

Appellee,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington; The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens committee"

United States of America,

Appellee,

v.

No. 80-1494

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon

L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellant.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Mannie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

Appellants,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela

Reineri, representing the "Involved Citizens Committee"

United States of America,

v.

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Craton Liddell, a Minor, by Minnie Liddell, his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Liliie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors, by Jerrianne Adams, their Natural Guardian and Next Friend, and Jerrianne Adams. Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural

No. 80-1531

Appeals from the United States District Court for the Eastern District of Missouri.

Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1599

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellee,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education.

Craton Liddell, a Minor, by Minnie Liddell; his Mother and Next Friend, and Minnie Liddell; Joanna Goldsby, a Minor, by Barbara Goldsby, her Mother and Next Friend, and Barbara Goldsby; Deborah Yarber, a Minor, by Samuel Yarber, her Father and Next Friend, and Samuel Yarber; Nathalie Moore, a Minor, by Louise Moore, her Mother and Next Friend, and Louise Moore; Rachelle LeGrand, a Minor, by Lois LeGrand, her Mother and Next Friend, and Lois LeGrand, on behalf of themselves and all other school-age children and their parents residing in the metropolitan school district of the City of St. Louis, Missouri,

and

Earline Caldwell, Lillie Caldwell, Denise Daniels, Dwane Daniels, Gwendolyn Daniels, Cedric Williams, Stephanie Williams, Gloria Williams, Janis Hutcherson, Lee Hutcherson, Robert Smith, Eddie S. Willis and the National Association for the Advancement of Colored People,

Appellants,

City of St. Louis,

Janice Adams and Jack Adams, Jr., Minors by Jerrianne Adams, their Natural Guardian and Next

Friend, and Jerrianne Adams; Catherine M. Neel and Camille A. Neel, Minors, by Catherine Neel, their Natural Guardian and Next Friend, and Catherine Neel; Mary Edington and Susan Edington, Minors, by Horace Edington, their Natural Guardian and Next Friend, and Horace Edington, The Concerned Parents for Neighborhood Schools,

and

Mary Puleo, Gerard Puleo, Emma Dannenberg, Robin Dannenberg, Louis Reineri and Mary Anjela Reineri, representing the "Involved Citizens Committee"

United States of America,

Appellee,

v.

No. 80-1735

Board of Education of the City of St. Louis and Daniel L. Schlafly, Frederick E. Busse, Gordon L. Benson, Malcolm W. Martin, Mrs. Anita L. Bond, Mrs. Joyce Bowen, Henry M. Grich, Jr. (Secretary), Rev. James L. Cummings (President), Mrs. Erma J. Lawrence, Rev. Donald E. Mayer (Vice President), Lawrence Moser, Charles Harris, and Julius C. Dix, Benjamin M. Price, Robert W. Bernthal, David J. Mahan, Charles Brasfield (School District Superintendent) and Robert E. Wentz (Superintendent of Schools),

Appellees,

and

The State of Missouri, Arthur Mallory, Commissioner of Education of the State of Missouri, The State of Missouri Board of Education,

Appellees.

Filed: March 19, 1981

Before HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

ORDER

This Court has before it a number of motions relating to the above entitled case.

I.

The motion of the Special School District of St. Louis County, Missouri, to intervene on appeal for the purpose of filing a petition for rehearing or rehearing en banc is granted. The petition for rehearing or rehearing en banc is denied, the latter by a unanimous vote of the Court.

The Special School District asks us to review our decision of February 13, 1981, asserting that that decision is inconsistent with an August 15, 1980, order of this Court which denied the Special District's petition for a writ of prohibition.

We do not agree. The primary issue addressed by this Court in its August 15 ruling was whether the Special District would be provided with a full and fair opportunity to present its views to the district court prior to being ordered to remedy its constitutional violations, if any.

The district court correctly perceived the thrust of our August 15 ruling. In a December 19, 1980, order denying the Special District's motion to disqualify him from further proceedings in the case, Judge Meredith declared, "The Special District can rest assured that before any action is taken that would affect it, it will have ample opportunity to be heard." Similarly, in an order dated March 4, 1981, Judge Hungate reiterated the view that voluntary cooperative efforts with the School District of the City of St. Louis would result in no prejudice to the legal rights of the Special District:

> This Court emphasizes that a 12(b) *plan* has merely been filed with the Court as required by Judge Meredith's order of May 21, 1980. No action has or will be taken until a hearing has been held during which the [Special District] will have ample opportunity to be heard. [Emphasis included.]

Judge Hungate has now set May 11, 1981, as the hearing date for questions involving the Special District, and he has established a discovery and briefing schedule designed to facilitate resolution of the issues and provide the parties with full opportunity to be heard. We express no opinion as to the merits of the issues to be heard by Judge Hungate.

II.

The Caldwell plaintiffs petition this Court for rehearing, modification and/or clarification of this Court's decision of February 13, 1981. They ask this Court to modify its February 13, 1981, opinion "to reflect the fact that paragraph 12(c) of Judge Meredith's order of 21 May 1980 was amended by him on 17 September 1980, and that proceedings now pending in the district court may moot the controversy over paragraph 12(c)."

In subdivision III of this order, we have denied the State of Missouri's motion for a stay of mandate or stay of enforcement of the district court's paragraph 12 orders. In that subdivision, we acknowledge the amendments made by the district court; we see no need to further modify our opinion of February 13, 1981. There is nothing inconsistent about paragraphs 12(a) and 12(c), and both are valid parts of the district court's order. We additionally acknowledge the protective orders entered by Judge Meredith on June 17, 1980, and October 6, 1980, were extended by Judge Hungate on March 4, 1981, and note our concurrence therewith.[1]

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[1]In essence, these protective orders provide that any form of voluntary cooperation by the parties or County school districts will not be used as evidence in pending district court proceedings or otherwise prejudice the legal rights of any party or County school district to resist judicial imposition of compulsory inter-district remedy.

The Caldwell plaintiffs also ask this Court to clarify its decision on the allocation of costs on appeal or, in the alternative, to grant a rehearing and direct that "the costs on appeal, including attorneys' fees, be awarded against the State and St. Louis Board defendants in their favor. We decline to attempt to restate our original intentions concerning costs. Prior to the filing of this petition, the Caldwell plaintiffs made no application for attorneys' fees. We construe this petition, however, as a request for a ruling on whether they are entitled to attorneys' fees. We hold that they are not.

III.

On February 19, 1981, the State of Missouri[2] filed a motion requesting this Court to "stay the issuance of its mandate * * * as well as the enforcement of paragraphs 12(a), (b), and (c) of the May 21, 1980 Order of the District Court * * *, including the [district court's December 19, 1980,] supplementary order pertaining thereto * * *," pending the filing of a petition for a writ of certiorari in the United States Supreme Court. *See* Fed.R.App.P. 41(b). We deny the motion to stay our mandate or to stay enforcement of the district court's orders and adhere to our most recent pronouncement concerning the State's legal responsibilities for the prompt desegregation of the St. Louis public school system. *See Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 17-20, 27-29 (8th Cir. Feb. 13, 1981).

On March 3, 1980, this Court reversed the district court's determination that the various defendants in this litigation committed no constitutional violations in the formation and perpetuation of the admittedly segregated

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[2]For a complete listing of the state defendant-appellants in this litigation, *see Liddell v. Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 13 n.2 (8th Cir. Feb. 13, 1981).

St. Louis public school system. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 101 S.Ct. 88 (1980). At that time, we specifically noted that the State of Missouri, the Missouri Commissioner of Education and the Missouri Board of Education were added as defendants pursuant to various district court orders in the summer of 1977. *Id.* at 1283. Moreover, we recognized that actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area. *Id.* at 1291, 1294 n.27. The state defendant-appellants did not seek Supreme Court review of our Adams' decision.[3]

We remanded the case for further district court proceedings. Upon remand, the district court held that the State defendants are "primarily constitutional wrongdoers who have abdicated their affirmative remedial duty" concerning the segregated St. Louis public school system. *Liddell* v. *Board of Educ.*, 491 F.Supp. 351, 359 (E.D. Mo. 1980). On February 13, 1981, we affirmed that determination and endorsed the desegregation plan adopted by the district court, including the provisions of paragraph 12. *Liddell* v. *Board of Educ.*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 28-29 (8th Cir. Feb. 13, 1981).[4]

The district court amended paragraph 12 on September 17, 1980, and December 19, 1980. Unfortunately, these amendments were not included in the record submitted to this Court prior to our February 13, 1981, decision. Therefore, our February 13, 1981, decision does not discuss the

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[3]Only one party—the Adams' plaintiffs—asked the Supreme Court to review our decision; the Court denied the petition for certiorari.

[4]We also affirmed the district court's determination that the State of Missouri must pay one-half of the actual costs of implementing a constitutionally required desegregation plan for the St. Louis public school system.

district court's two amended orders. We are convinced, however, that these amendments do not alter the substance of original paragraph 12. Accordingly, we find it unnecessary to amend our February 13, 1981, decision to reflect the district court's September 17, 1980, and December 19, 1980, amendments. As amended, paragraphs 12(a)-(c) provide:[5]

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by *December 15, 1980.*
>
> *The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete*

---

[5]We note that the State of Missouri has filed a notice of appeal from the December 19, 1980, order of the district court. While we express no opinion on the merits of that appeal, we emphasize that its pendency does not relieve the parties of their responsibility to fully follow the orders of the district court.

In the quotation in the text, the amendments to paragraph 12 made by the September 17, 1980, order of the district court are indicated in italics. The amendments made by the December 19, 1980, order are underlined.

and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or be-

fore February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by *December 15, 1980,* a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

c) To develop and submit to the Court by November 1, 1980, a suggested plan of inter-district school desegregation necessary to eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.

On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involv-

ing the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

The State's motion does not persuade us to stay our February 13, 1981, mandate. Moreover, we are satisfied that the provisions of paragraph 12, both as originally written and as amended, must be enforced. The State's motion does not raise any new issues. Indeed, we previously considered and rejected the very concerns presented in its stay motion. *See Liddell* v. *Board of Educ., Nos.* 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735, slip op. at 19-20 (8th Cir. Feb. 13, 1981). In our February 13, 1981 opinion, we stressed that the State of Missouri, who has been judicially determined to be a primary constitutional violator, may properly be ordered to take steps within its power to remedy those violations. *Id.* at 20. Paragraphs 12(a)-(c) of the district court's order are salutory remedial directives and are entirely enforceable against the State in the present procedural posture of this lengthy and complicated litigation.

The State of Missouri's motion is denied. We order prompt implementation of our mandate in *Liddell* v. *Board*

of Educ., Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir. Feb. 13, 1981).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	No. 72-100C(4)

ORDER

This matter is before the Court following a hearing on one aspect (known as the 12b section) of this lengthy school desegregation action—desegregation of vocational education in the City of St. Louis and St. Louis County. This decree is made and entered into pursuant to prior orders of this Court, the Eighth Circuit Court of Appeals, and the stipulation of facts entered into by parties hereto.

1. This school desegregation action was initiated as a class action on February 18, 1972, and detailed histories of the case are set forth in this Court's opinions of *Liddell* v. *Bd. of Ed. City of St. Louis, etc.*, 469 F.Supp. 1304 (E.D. Mo. 1979); *Liddell* v. *Bd. of Ed. of City of St. Louis, Mo.*, 491 F. Supp. 351 (E.D. Mo. 1980); and in the opinions of the Court of Appeals. *See Liddell* v. *Caldwell*, 546 F.2d 768, 769 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Adams* v. *United States*, 620 F.2d 1277, 1281-84 (8th Cir.

1980); and *Liddell* v. *Board of Education of the City of St. Louis*, No. 80-1458 (8th Cir., Feb. 13, 1981).

The subject matter of this order concerns the integration of area vocational schools of the City of St. Louis and the Special School District of St. Louis County, and the delivery of educational services to secondary school students at those schools and in community based or magnet vocational programs.

2. This Court has jurisdiction of the subject matter of this class action, has jurisdiction over all the parties, and hereby enters this judgment and decree.

3. This order is made pursuant to paragraph 12b of Judge Meredith's order herein of May 21, 1980, as amended, providing:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows . . . .
>
> b. To develop and submit to the Court . . . a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis for implementation in the 1981-1982 school year. *Liddell, supra*, 491 F.Supp. at 353.

This order is further made pursuant to the directive of the Court of Appeals approving paragraph 12b of Judge Meredith's opinion of May 21, 1980, and affirming Judge Meredith's order of May 21, 1980.

The Eighth Circuit Court of Appeals held:

> Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court

> specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." . . . Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit. We see so reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year. *Liddell* v. *Board of Education*, No. 80-1458, slip op. at 19.

4. The Special School District of St. Louis County was added as a party defendant to this cause on September 12, 1980, upon motion of the Caldwell plaintiff-intervenors.

On May 4, 1981, stipulations of fact were filed with this Court signed by all parties except the Liddell plaintiffs. On May 20, 1981, Liddell consented to the stipulation of facts so that it has been executed by all parties hereto.

On December 15, 1980, pursuant to paragraph 12b, the St. Louis Board of Education and the State defendants submitted proposed plans concerning vocational educational programs in the City and County. The St. Louis Board proposed expanding the Special School District's boundaries to include the City of St. Louis to serve both the vocational and special education needs for the City of St. Louis and St. Louis County. The proposal recommended as a desegregation goal a ratio of two white students to one black student at each traditional site involved, and the implementation of community-based and magnet vocational programs. To implement the City's Board's proposal the Board proposed that the Court appoint a nine-member board of education for the district and empower the nine-member board to levy a tax of $.55 to support the basic

cost of vocational and special education. The effect of the levy would be to increase the tax rate in the City of St. Louis by $.55.

The State defendants' proposal suggested that the St. Louis Board and the Special School District (1) initiate at least twenty percent of their offerings on a half-day basis; (2) give consideration to operating the program at O'Fallon and at North and South Technical Schools as well as other unused schools on a three session per day year-round basis; and (3) initiate joint community-based programs. Student transfers between the City Board and the Special School District programs would be on a voluntary basis. No specific desegregation goals were contained in the proposals, and the implementation of the plan as submitted would require increased expenditures by the St. Louis City Board and the Special School District.

The Special School District was not, under paragraph 12b, *supra*, required to submit a plan to the Court, but did submit a proposal on March 24, 1981. The substantive portion of that proposal concerned placing City students in the Special School District's vocational programs in prescribed numbers under certain conditions, and was not specifically designed to address desegregation at O'Fallon Technical School.

On March 4, 1981, the Court set a hearing to begin May 11, 1981, to consider the issues concerning the Special School District and established pretrial procedures for the hearing. On subsequent dates the Court established the agenda for the hearing and the order for the presentation of the issues and evidence.

On May 8, 1981, the Special School District lodged another proposal with the Court. That proposal served as a basis for extensive negotiations which resulted in a proposed consent decree supported by a majority of the parties

and also a plan agreed to by all of the parties except the intervening plaintiffs, Adams.

On May 11, 1981, the Court duly convened for the scheduled hearing. The parties advised the Court they were "embarrassingly close" to reaching a settlement on the vocational education (12b) issues. In response to the parties' requests, the Court deferred the proceedings. Upon the parties' progress reports to the Court, the hearing was continued on a day-to-day basis to accommodate the ongoing settlement negotiations until the parties reduced a proposal into writing and, on May 20, 1981, submitted to the Court a proposed vocational education plan, funding order, and consent decree.

On May 21, 1981, the Court conducted a hearing. Without objection, the Court admitted into evidence the stipulations of fact, as supplemented, and exhibit nos. 1-39 and 41-44 (document no. 40 does not exist) offered by the United States. All parties were provided an opportunity to be heard. The Court issued its funding order and made the proposed consent decree and plan a part of the record.

Parties were notified on May 27, 1981, that a hearing would be held beginning June 9, 1981, on the proposed 12b consent decree. A Notice to Class was filed of record, served by publication and duly posted at all schools operated by the City School Board and at all Special School District schools, on May 27, 1981. Interested individuals were granted until June 8, 1981, to request leave to appear in support or opposition to the proposed decree or to file written memoranda stating their positions. No individual, other than the Adams plaintiffs-intervenors, filed written requests for leave to present opposing testimony and argument. On May 26, 1981, the Adams plaintiffs filed revised objections to the consent decree. The Liddell plaintiffs orally requested leave to argue in opposition to the proposed decree, but did not request leave to present testi-

mony thereon. Only three letters were received from members of the public which were duly filed, considered by the court, and made a part of the record. Also filed by the attorneys for the school district of University City was a memorandum of comments and suggestions to the Plan. The comments made have either been considered and rejected by the parties, or the suggestions were in fact dealt with in the Plan.

The parties have, in numerous filings with this Court, the Court of Appeals, and the United States Supreme Court, stated their positions as to the facts and law regarding the issues. In the proposed consent decree submitted to the Court, the parties recited that

> By consenting hereto no party retracts its previous positions or concedes that its respective positions are in any way erroneous. However, the parties being desirous of implementing a solution to the issues concerning paragraph 12(b) of the May 21, 1980 order without the expense of litigation, have agreed to the entry of the decree, and the Court being of the opinion that the entry of this decree will effectuate federal law . . . ."

The City of St. Louis, the United States, the Caldwell plaintiffs-intervenors, and the Special School District support the consent decree without equivocation. The Board of Education of the City of St. Louis supports the decree in accordance with the funding order entered on May 21, 1981. The State has executed the consent decree and approves the vocational plan, but is critical of the funding order. The Liddell plaintiffs approve the plan, but withheld approval of the consent decree, questioning the adequacy of the jurisdictional statement in the first paragraph. The intervening plaintiffs, Adams, object to the plan and the decree.

5. Traditionally a "consent decree" is in the nature

of a contract which is sanctioned by the Court as to what decision should be made. *See* discussion in 30A C.J.S., *Equity*, §678 (1965). Recently, however, it has been held, at least in some decisions, that consent of all the parties is not required for a valid consent decree.

> Unless [a non-consenting party] can demonstrate that it has been ordered to take some action by the decree, or ordered not to take some action, or that its rights or legitimate interests have otherwise been affected, it has no right to prevent the other parties and the Court from signing the decree.

United States v. *City of Miami, Fla.*, 614 F.2d 1322, 1329 (5th Cir.), *reh. granted*, 625 F.2d 1310 (1980). The Court finds that the intervening plaintiffs, Adams, are not ordered to take action or to desist from any action by reason of the decree and the Court finds that their rights or legitimate interests have not been affected hereby.

Notwithstanding the holding in *Miami* on which rehearing was granted, the Court is reluctant under circumstances here to enter an order and judgment as a "consent decree." Not all of the parties have consented to the decree, although it has been approved by a majority thereof. The plan has been approved by all the parties except intervening plaintiffs, Adams. Therefore, the Court hereby adopts the Vocational Education Plan agreed to by seven of the eight parties as its plan to desegregate the vocational schools in the City of St. Louis and St. Louis County. The plan is attached hereto and made a part of this order.

6. At the conclusion of the scheduled evidentiary hearing on the proposed consent decree, funding order, and plan, on June 9, 1981, and after all parties were afforded an opportunity to be heard thereon, the Court finds that the Vocational Education Plan attached hereto is fair, reasonable, adequate and satisfies constitutional require-

ments to integrate the vocational schools in the City of St. Louis and St. Louis County, and conforms to the guidelines of the Eighth Circuit. The Court is satisfied that under the totality of the circumstances, the vocational plan is fair, reasonable, and adequate. *Armstrong* v. *Board of School Directors of the City of Milwaukee,* 616 F.2d 305 (7th Cir. 1980). The Plan calls for a full measure of desegregation and conforms to a level of constitutional compliance. It contains racial goals reflective of the overall black-white student ratios in the two districts. It contains mechanisms for achieving these racial goals. Under the totality of the circumstances, the Court orders the attached plan implemented inasmuch as any student in a vocational school may return to his or her regular high school at will. Vocational education in Missouri is voluntary. A program of vocational education need not be offered, but if it is offered it must be done in a nonsegregative manner. By approving the plan, it facilitates the implementation of a quality educational program in a desegregative atmosphere. The Court adopts the plan as its own because school desegregation is one of those areas in which voluntary resolution, if possible, is preferable to full litigation. *Armstrong, supra,* 616 F.2d at 318; *Mendozo* v. *United States,* 623 F.2d 1338, 1345 (9th Cir. 1980).

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Court approves of the attached Vocational Education Plan for the Boards of the City of St. Louis and the Special School District of St. Louis County and adopts the Plan as its own.

2. The Special School District of St. Louis County, the Board of Education of the City of St. Louis, and the State of Missouri are ordered to implement the Plan forthwith.

3. By April 1 of each school year, the Metropolitan

Coordinating Committee described in the Plan shall file with the Court an annual plan, approved by the respective Boards, which shall describe the various steps to be taken to reach the goals indicated in the Plan for the next school year.

4. If any party objects to an annual plan or to any provision of an annual plan submitted to this Court as required in paragraph 3 of this order, that party must file notice of the objection with this Court within thirty days from the date the plan is filed with this Court. If objections are filed, a hearing will be set on the objections at a subsequent date.

5. The progress made in implementing the plan will be reported by the Committee to the Court pursuant to page seven of the attached plan. Additional data reports shall be filed on October 31, 1981, and on March 31, 1982, and on the same dates annually thereafter until further order of the Court. The reports shall contain:

A. The following information by home district, grade level, program and race:

(a) The number of students enrolled in each school or site;

(b) The number of students assigned since the last report to a school or site other than his/her first choice for the purpose of achieving racial goals, and the number who did not accept the assignments.

B. The number of slots available for juniors and seniors at each school or site.

C. A description of the recruitment activities undertaken by either Board or the Committee since the previous report.

D. A description of the measures taken since the last report by each district to achieve parity.

E. All programs moved from one district to another, and the teachers assigned by race, to such moved programs.

F. All unduplicated and magnet programs developed since the last report and their locations.

G. Brief description of any present or proposed construction of expansion of vocational education facilities.

H. Statement whether either District has sold or abandoned any vocational education facility, equipment, or supplies having a total value of more than $500.00 since the previous report.

6. After the completion of the 1985-86 school year, the Court will review the progress made and assess whether the goals of the plan have been met. In the event the goals are not met, upon motion of a party, and after a hearing, the Court may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify the plan attached hereto, or adopt any other plan in accordance with paragraph 12b of the May 21, 1980, order.

The Special School District, the City Board of Education, the United States, and the State of Missouri shall submit an interim report by July 15, 1983, on the success of implementation for the Court's evaluation and recommendation, and for the Court's action, if any, as appropriate.

7. Funds to meet the commitments of the State defendants to the plan approved herein shall be made available by the State defendants and the Missouri General Assembly subject to and in compliance with any applicable provisions of law.

8. No party has consented to the award of litigation costs and/or reasonable attorneys' fees. This matter is reserved for such further negotiations and/or proceedings,

including applications to the Court, as may be appropriate following the Court's approval of this decree.

9. All previous orders of this Court not inconsistent herewith remain in full force and effect.

10. In order to establish vocational programs in ninth and tenth grades at regular comprehensive high schools, it is necessary for the City Board to develop, equip, and/or renovate buildings for General Shop, Business Education and Industrial Arts programs at those schools. Additional operating costs such as additional teachers may also be necessary to effectively implement these programs.

There are State of Missouri designated funds allocated for the 1980-81 St. Louis Desegregation Budget which have not been spent in the 1980-81 school year. There are also ESAA funds which have been approved for particular programs for the 1980-81 school year which will not be spent in the 1980-81 school year. The reprogramming of these ESAA funds required the Board of Education of the City of St. Louis to apply immediately for and receive such permission from the United States Department of Education. Therefore, IT IS HEREBY ORDERED that

A. The Board of Education of the City of St. Louis shall establish during the term of the consolidated vocational technical education plan and continuing thereafter vocational programs in General Shop, Business Education and Industrial Arts for grades nine and ten in its regular comprehensive high schools.

B. The Board of Education of the City of St. Louis shall continue to act promptly on its application to the Department of Education to rededicate ESAA funds which have been approved for particular programs for the 1980-81 school year but which will not be spent in the 1980-81 school year in order to fund costs for the development,

equipment, renovation and operational costs for the City Board's vocational programs.

C. One Million Dollars ($1,000,000.00) of State of Missouri designated funds allocated for the 1980-81 St. Louis Desegregation Budget which have not been spent in the 1980-81 school year will be placed in a separate account in order to pay for such costs.

D. The Board of Education of the City of St. Louis shall reimburse the State for State funds identified in subparagraph C above, spent to the extent that monies are available at the end of the 1981-82 school year from the City Board's Debt Retirement Fund which are not otherwise restricted by prior Court order or necessary for the retirement of the City Board's debt. If the City Board has no such funds, the State shall continue to pay such costs from the funds identified in subparagraph C above.

E. If the above funds are still insufficient to develop, equip, renovate and cover increases in operational costs for these programs which result from compliance with the plan and this decree, then the remainder of the unspent State designated monies existing in the 1980-81 Desegregation Budget shall be utilized as necessary

11. During the phase out of ninth and tenth grade students from O'Fallon Technical High School to comprehensive high schools in the City of St. Louis, the State funding allocated for such programs during the school year of phase out shall be paid to the Board of Education of the City of St. Louis for vocational education related matters. Said funding to the City Board shall continue each year thereafter.

12. The Court recognizes that the Special School District has previously budgeted two million dollars ($2,000,000.00) for equiping West County Technical High School which will open in Year Two of the 12b plan for

consolidated vocational programs. Much of this equipment will be used at the discretion of the Metropolitan Coordinating Committee for unduplicated programs under the consolidated program plan.

13. All costs concerning the implementation of the vocational programs shall be subject to review by this Court if any party disputes any of these costs as not being reasonable or necessary for the implementation of this order.

14. In the event that the Board of Education of the City of St. Louis is unable to fund the development, equipment and/or renovation costs and to cover increases in operational costs for these programs which result from compliance with the plan and this decree from the above sources or with current desegregation budgeted revenues, the Board of Education of the City of St. Louis shall apply to the Court for such appropriate orders as may be necessary to secure additional funds essential for such purposes.

15. As to those dates on the implementation schedule which are now past, the action required thereunder shall be taken within ten days of the date of this order and be effective nunc pro tunc.

16. This Court retains jurisdiction of this action for all purposes including the entry of such additional orders as may, from time to time, be necessary and proper.

Dated this 11th day of June, 1981.

William Hungate
United States District Judge

VOCATIONAL EDUCATION PLAN FOR THE BOARDS OF EDUCATION OF THE CITY OF ST. LOUIS AND THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY

1. Primary governance of the consolidated vocational-technical school programs* of the Board of Education of the City of St. Louis (hereinafter "City Board") and the Board of Education of the Special School District of St. Louis County (hereinafter, "Special District") will remain vested in each of the two existing Boards of Education, respectively. This vested authority is the policy decision making responsibility of the respective Boards including but not limited to the operation of the respective programs, employment of staff, development of personnel and appropriation of funds to meet the district's needs.

The plan is continuing in nature and the initial period of the plan will be five years.

2. This plan will be administered by a Metropolitan Coordinating Committee, hereinafter referred to as "the Committee", composed of two staff persons from the vocational department of the City School District and two staff persons from the vocational department of the Special School District. It is recommended that the chief administrative vocational officer and another vocational staff member in each district be selected to serve on this Committee. Selection will be made by the Boards of the respective districts. A fifth member will be appointed by the State Board of Education and will function in the role of an advisor and resource person, and as a tie breaker if the four other representatives are unable to reach a decision. The State Board representative has a primary re-

*This includes O'Fallon, North, South, West and other sites as needed for a community-based or magnet vocational-technical program. Not included are comprehensive high school, middle and elementary vocational or pre-voc programs.

sponsibility for seeing that the desegregation requirements of this plan are met.

The term of membership of the four vocational representatives shall be for the duration of the plan. Removal of any local representative may only be done with the approval of the Court upon motion of a party.

3. The Committee, in conjunction with the two Boards and with such consultant help as the Committee deems necessary, will develop a Memorandum of Understanding to be entered into by each respective Board. Such Memorandum will provide operational guidelines under which the committee will function with respect to but not limited to such items as:

—Teacher assignment (See paragraph 14)

—Teacher recruitment for vacancies

—Teacher grievance procedures

—Teacher evaluation procedures

—Student application and selection process and criteria

—Student discipline procedures

—Student grievance procedures

—Program development, assessment, revision procedures

—Budget and financial process, procedures and commitment

—Staff development and training to function effectively in a fully desegregated program

—Transportation

—Other items as may be pertinent and necessary for successful administration

The Memorandum of Understanding, upon approval, will be submitted to the Court as an addendum to this plan.

4. The responsibilities of the Committee include, but are not limited to all planning activities and decisions that are a direct result of this plan and necessary to its administration such as:

—Determination and location of programs and offerings

—Student recruitment, selection criteria, and assignment

—Program review, evaluation and revision as needed

—Development and recommendation of budget

—Development and location of any new program, schools or program sites

—Recommendation for any alternative use of existing facilities

—General program administration, operation and maintenance

The Committee will elect a chairperson and a secretary. The chairperson will be responsible for convening the Committee. The Committee will be responsible for keeping a complete record of proceedings and communicating decisions and other information to the appropriate parties.

The Committee will hire an Executive Director, following regular hiring practices of the two Boards insofar as possible, to assume administrative responsibility for program operations. The Executive Director will serve as chief administrative officer to carry out the procedures and programs developed by the Committee. The Executive Director will be an ex-officio, non-voting member of the Committee. The cost of the Executive Director will be paid by the two districts and the State Department of Elementary and Secondary Education in three equal shares.

Matters such as time, dates and places of meetings can be determined at the initial meeting of the Committee. The nature of this plan and the formation of a Committee for vocational education in the Metropolitan St. Louis Area could require professional assistance. Therefore, a small, but adequate budget should be established to hire consultants and to reimburse Committee representatives for out-of-pocket expenses in the performance of their responsibilities. The State will provide the funds for a consultant while the districts reimburse their respective appointees for out-of-pocket expenses.

5. A two member, bi-racial monitoring team will be appointed by the Court, based on recommendations of the Committee and the parties. The team shall consist of experts in vocational education who are in no way connected with the Districts and will conduct two on-site visits of no less than three days each during each of the initial five years. The monitoring team will be charged with the responsibility of assessing the degree to which the plan is successful and will make recommendations to the Committee where appropriate. The team will report to the Court and to the respective Boards any situations, conditions, or problems which appear to impede successful plan implementation which the Committee is unable to correct or solve.

6. The Committee will use the services of the existing vocational advisory committees, which are biracial and reflect a cross section of the community including representatives from business, industry and unions, to provide citizen input, assessment and advice related to each vocational program.

7. At the beginning of the fifth year (1985-1986) it is a goal of the plan to have at each of the four technical schools—North County Technical, South County Technical,

West County Technical and O'Fallon—a racial balance of 65% white and 35% black, with 10 percentage points leeway up or down.

8. In each year the total number of County students placed in City Board and Special District programs may not exceed the total slots available and approved for juniors and seniors in the Special District Technical schools and other developed sites and the total number of City students placed in City Board and Special District programs may not exceed the total slots available and approved for juniors and seniors at O'Fallon and other developed sites. Within this closed system, however, these numbers may change as total program slots in either district are increased or decreased equitably as approved by the Committee. It is the goal of both Districts to significantly increase vocational education opportunities in integrated settings. The Committee will attempt to improve programs by either expanding or contracting offerings, based on need, to the extent that an equal number of additional or reduced slots will be allocated to the City Board and the Special District, and that new programs will follow the 65% white—35% black (plus or minus 10 percentage points) guidelines.

9. After Year 2 of the plan no fee for vocational training will be charged by one district to the other since it is contemplated that the same number of County students will be attending O'Fallon as City students are attending Special District vocational schools. During Years 1 and 2 fees for vocational training will be paid by the respective Districts only for the incremental costs incurred by those Districts for the provision of this first year's instruction of exchange students, and every effort will be made to absorb such students at no cost.

10. Significant recruitment activities for the consolidated vocational technical programs will be undertaken by the Committee and the respective Boards to assure the achievement of the racial balance goals projected.[1] Recruitment will include open houses, mass mailings to parents of the 9th and 10th graders in the metropolitan area, feature newspaper stories, school visits, etc. A major portion of the recruitment activities during the first year will center around the development of recruitment materials for distribution. The responsibility for the development of recruitment materials and methods should be contracted out with the costs being reimbursed by the State.

11. For *duplicated* programs (those which are offered at more than one school site) students will be given their first or second choice program, but in year two and subsequent years such program choice may be at a school other than the student's first choice for the purpose of achieving racial goals. Where the school site is other than the students first choice, the goal of racial balance of the classroom assignment will be 65% white and 35% black, with 10% leeway up or down. Where a student does not wish to accept a site other than his first choice, he is free to remain in his local high school.

12. Funding for new equipment for unduplicated programs will be provided by the State except to the extent that funds of either district have already been earmarked for such new programs. Wherever possible unduplicated programs will be developed from existing equipment, and the Committee will allocate such programs between the two districts so that neither district is burdened with such program equipment cost unfairly. Where existing equipment is used, the State will be responsible only for the costs due to relocation and modification of the equipment or buildings.

13. Parity of program quality will be essential to attract students and to operate on a non-tuition basis. During Year 1 of the plan the Special District and the City Board will each prepare the State form entitled "Guide for Computing Fees for Secondary Students Enrolled in Secondary Schools Designated as Area Vocational Schools". The information will be used as a guide by a consultant hired by the Committee for determining what steps are necessary, if any, to place the programs of each district on a parity for Year 3. Each district will improve or upgrade the physical aspects of any program or facility to reach parity.

No increased costs of the City Board attributable to the achievement of parity between the vocational education programs of the City Board and those of the Special District shall be paid by the Special District. Similarly, no increased costs of the Special District attributable to the achievement of parity between the vocational education programs of the City Board and those of the Special District shall be paid by the City Board. In the event that either Board is unable to fund any increased costs from current revenues including its desegregation funds or from other conventional sources, upon certification by the Committee that such costs and expenses are essential to the implementation of this plan, either Board shall apply to the Court for such appropriate orders as may be necessary to secure additional funds essential for such purposes.

14. Teachers will be encouraged to accept reciprocal visiting professorships between districts and to develop opportunities for team teaching. As the plan evolves, should a program be moved by the Committee from one district to another, the teacher will have the opportunity to follow that program and teach it at the new site. The teacher would have the option to remain an employee of

the sending Board or become an employee of the receiving Board. In the event there is an opening in the Special District vocational program for which a displaced City Board vocational teacher is qualified, the Special District would give the qualified City Board teacher preference. Reciprocally, if a Special District vocational teacher is displaced and an opening exists in the vocational program of the City Board, the qualified Special District teacher would have preference over all other applicants. The districts will provide a one-step salary incentive for teachers who transfer voluntarily to the other District if the transfer decreases racial concentrations.

15. The Committee will immediately initiate a study of courses offered at the comprehensive high schools in the city and county to identify ways of reducing duplication of programming between such high schools and the four vocational schools.

16. After the completion of the 1985-86 school year, the Court will review the progress made and assess whether the goals of this plan have been met. In the event the goals are not met, upon motion of a party, and after a hearing, the Court may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify this plan, or adopt any other plan in accordance with paragraph 12(b) of the May 21, 1980 order.

17. Scheduling enunciated in this plan is not intended as limiting. If goals can be achieved earlier than indicated, nothing in this plan is intended to preclude such result.

For the first year of operation steps will immediately be taken toward completion of the following activities in accordance with the schedule set out below:

IMPLEMENTATION SCHEDULE

Activity	*Completion Date*
1. Appoint Metropolitan Coordinating Committee	May 29, 1981
2. Initiate search for Executive Director	May 29, 1981
3. Initial strategies developed for fall '81 programming and student assignments	June 15, 1981
4. Implement initial strategies	June 17, 1981
5. Initiate study of comprehensive high school programs	June 19, 1981
6. Complete rough draft of Memorandum of Understanding and submit to both Boards	June 22, 1981
7. Board Review of memorandum	July 1, 1981
8. Revise Memorandum as needed	July 15, 1981
9. Submit Memorandum to Boards for ratification	August 1, 1981
10. Detailed strategies developed for '81-'82	August 3, 1981
11. Hire Executive Director	August 3, 1981
12. First monitoring team visit	August 28, 1981
13. Implement fall strategies	Sept. 1, 1981
14. File preliminary progress report with Boards and Court	Sept. 15, 1981
15. Complete comprehensive high school study	Nov. 2, 1981

16. Specific strategies developed for Year 2—1982-83 — March 1, 1982
17. Board review and approval of strategies — March 15, 1982
18. Second monitoring team visit — March 19, 1982
19. Submit Year 2 plan to Court with progress report to date — April 1, 1982
20. Implement Year 2 strategy plan — April 5, 1982
21. Monitoring team visit — Nov. 1982
22. Repeat steps 16—21 each year — continuing

By April 1 of each school year, the Committee will file with the Court a plan, approved by the respective Boards, which describes the steps to be taken to reach the goals indicated herein for the next school year, and a progress report of accomplishments, including findings of the Monitoring Team.

IMMEDIATELY—(Prior to the end of the 1980-81 School Year and Summer)

1. Draft agreement.
2. Boards and parties ratification of agreement, and the submission to the Court for approval.
3. Establish Metropolitan Coordinating Committee.
4. Draft and ratify Memorandum of Understanding.
5. Special District and City Board recruitment of City and County students for interdistrict transfers for Fall.
6. Each District fill out State's "Guide for Computing Fees . . . ".
7. Review organization of City and Special District Vocational Departments to insure ability to respond to and implement plan.

YEAR 1—1981-82

IMPLEMENTATION:

1. Expected racial distribution of 85% white and 15% black in Special District Technical Schools.
2. Continue and increase public relations campaign and recruitment.
3. Assure that no student will be displaced from on-going program.
4. Initiate community-based programs[2] of business office education and urban agriculture. (need state approval) Racial balance goal is 65% white and 35% black, but with 10 percentage points leeway up or down.
5. Initiate half day programs at North County Technical and South County Technical.
6. Cosmetic improvements at three present technical schools.

PLAN:

1. Develop nine unduplicated programs for initiation in Year 2.
2. Develop and seek funding for three additional community based programs for initiation in Year 2.
3. Develop common or cooperative metropolitan placement service.
4. Define relationship between Special District and City Board recruitment. Develop common or cooperative approaches.
5. Evaluate City Board and Special District programs for changes for Year 2. Duplicated programs must be of comparable quality and substance. Plan for complete parity by Year 3.

6. Develop programs, staff and equipment for West County Technical.

7. Revise curriculum for Special District occupational orientation to include exposure to City Board offerings.

Available Slots: City Board 970

Special District 2500

YEAR 2—1982-83

IMPLEMENTATION:

1. Expected racial distribution of 82% white and 18% black in Special District technical schools.

2. Initiate unduplicated programs at O'Fallon with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.

3. Open West County Technical and initiate unduplicated programs with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.

4. Placement of the nine unduplicated programs referred to in paragraphs 2 and 3 above will be determined by the Committee.

5. Initiate half day programs at O'Fallon.

6. Expected racial distribution of 10-15% white and 85-90% black at O'Fallon.

7. Initiate three additional community based programs.

8. Establish common or cooperative placement service.

9. Establish common or cooperative recruitment and counselling service.

10. Initiate revised occupational orientation in Special District.

PLAN:

1. Develop three additional unduplicated programs for initiation in Year 3.
2. Develop and seek funding for two additional community based programs for initiation in Year 3.
3. Evaluate all City Board and Special District programs for changes for Year 3.
4. Develop programs, staff and equipment for 2nd year (Year 3 of plan) at West County Technical.
5. Necessary steps to insure full parity by Year 3.

Available Slots Projected: City Board 1150

Special District 2800

YEAR 3—1983-84

IMPLEMENTATION:

1. Expected racial distribution of 78% white and 22% black in Special District technical schools.
2. Expected racial distribution of 50% white and 50% black at O'Fallon.
3. Initiate three additional unduplicated programs with goal of 65% white and 35% black, but with 10 percentage points leeway up or down.
4. Initiate second year programming at West County Technical.
5. Initiate two additional community based programs.
6. Continue and adjust public relations and recruitment.
7. O'Fallon will initiate 10th grade Occupational Orientation magnet program for City students with goal of 50% white and 50% black.

PLAN:

1. Develop one additional unduplicated program for initiation in Year 4.
2. Evaluate all City Board and Special District programs for initiation in Year 4.

Available Slots Projected: City Board 1300

Special District 2950

YEAR 4—1984-85

IMPLEMENTATION:

1. Expected racial distribution of 75% white and 25% black in Special District technical schools.
2. Expected racial distribution of 65% white and 35% black at O'Fallon.
3. At least thirteen unduplicated programs will be in operation.
4. West County Technical will be at its full student capacity.
5. At least seven community based programs will be in operation in the metropolitan area.

Available Slots Projected: City Board 1500

Special District 3150

YEAR 5—1985-86

IMPLEMENTATION:

1. Expected racial distribution for all schools within the range contemplated in paragraph 7.
2. Court will review progress in accordance with paragraph 16.

FOOTNOTES

1. Examples of Recruitment and Publicity Include:

   a. Set up and conduct a recruitment/orientation program in each sending school for ninth and tenth grade students and parents in the City and County.

   b. City Board and Special District counselor/recruiters are to be present at all programs to answer specific questions with regards to each schools course offerings and application procedures.

   c. A member of the Committee should be present at each program to answer students and parents questions with regard to transportation, discipline, class assignment, etc.

   d. Develop brochures and applications depicting all vocational offerings in the City Board and Special District.

   e. Send the brochure and application procedures to all 9th and 10th grade students currently enrolled in all public and private sending schools in the City Board and Special District.

   f. Set up open houses at all the vocational schools, City Board and Special District on different days, and notify by mail all 9th and 10th grade students of time and locations of activities.

   g. Develop a plan by which students may visit the technical schools while the schools are in session. This plan could also include that students in a particular vocational program may have extended time off from school and perhaps visit the shop for a few days or even a week (a welder in the City Board program would visit a weld shop in the Special District).

   h. Develop the following information material.

      a) slide presentation on City Board and Special District program offerings

      b) promotional films

      c) public service announcements

   i An all out effort to get industrial support and endorsements from City and County manufacturers.

   j. Recruit local sports personalities, state legislators, etc. for promotional spots and personal appearances.

   k. Develop feature T.V. and radio programs featuring the voluntary plan and its positive aspect on the community.

   l. Incorporate the use of feature articles and continuing news items in the City and County papers.

m. Establish an elementary career education program in all school districts to focus on vocational programming in the metropolitan area.

n. Set up counselor recruiting teams (1 City–1 County) to go to all the sending schools to recruit for the vocational programs.

o. Set up career information centers in all high schools and junior high schools in the City and County.

2. While application for these programs has been made by the Special District there is no reason why agreement cannot be reached between the City Board and the Special District for placement of these or other community based programs referred to in this Plan in the City.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	No. 72-100C(4)

PART ONE—INTRODUCTION AND ORDER

ORDER

This order deals with the voluntary desegregation of the public schools in the St. Louis metropolitan area.

This school desegregation class action case was initiated some nine years ago, on February 18, 1972. The detailed, lengthy histories of this cause are set forth in numerous opinions and there is no need to reiterate them here. *See Liddell v. Bd. of Ed. City of St. Louis, etc.*, 469 F.Supp. 1304 (E.D. Mo. 1979); *Liddell v. Bd. of Ed. of City of St. Louis, Mo.*, 491 F.Supp. 351 (E.D. Mo 1980); and the opinions of the Court of Appeals. *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Adams v. United States*, 620 F.2d 1277, 1281-84 (8th Cir. 1980); and *Liddell v. Board of Education of the City of St. Louis*, No. 80-1458 (8th Cir., Feb. 13, 1981).

This Court has jurisdiction of the subject matter of this class action, has jurisdiction over all the parties, and hereby enters this judgment and decree pursuant to its equitable powers.

This order is made pursuant to paragraph 12a of Judge Meredith's order herein of May 21, 1980, as amended, which provides:

> The State defendants, the United States and the St. Louis Board of Education are ordered and directed as follows:
>
> a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school disrict ordered herein, and submit such plan to the Court for approval by . . . .
>
> The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants and the St. Louis Board of Education on . . . .

Pursuant to [this] paragraph . . . the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new Plan of voluntary and cooperative desegregation on or before . . . . The Plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on . . . as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan.

> The report . . . shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

Paragraph 12a in its original form was approved by the Eighth Circuit in its opinion of February 3, 1981:

> Section (a) of paragraph 12 directs the parties to "make every feasible effort" to work out a voluntary plan of inter-district pupil exchanges to be implemented in the 1980-1981 school year. Because the plan is to be voluntary, no question is raised about whether the district court will be able to enforce the plan once it is drawn up. Under the terms of the order, the plan is to be designed to "assist in alleviating the school segregation in the City of St. Louis [and to ensure] that inter-district pupil transfers will not impair the desegregation of the St. Louis school district." 491 F.Supp. at 353. Thus, the voluntary exchanges contemplated by section (a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City. *Liddell v. Board of Education of the City of St. Louis*, No. 80-1458 (8th Cir., Feb. 13, 1981), slip op. at 19.

After some continuances, this Court, on March 4, 1981, ordered the State defendants, in cooperation with the Board of Education of the City of St. Louis and the United States, to file a 12(a) plan or plans within sixty days. An interim progress report was to be filed by the above parties within thirty days. Edward T. Foote, Chairman of the Desegregation Monitoring and Advisory Committee, was also requested to propose and file a plan for voluntary inter-district desegregation by March 27, 1981.

On March 27, 1981, the Chairman of the Desegration Monitoring and Advisory Committee, Dean Edward T. Foote, submitted an educational plan for voluntary inter-district desegregation. On May 4, 1981, the State defendants filed a plan for "voluntary transfer of students in the St. Louis Metropolitan area." On May 4, 1981, the United States and the Board of Education of the City of St. Louis also filed a joint plan pursuant to this Court's order of March 4, 1981. Both the State's voluntary plan and the U.S./City Board plan drew heavily from the Foote plan. The matters contained therein are identical or substantially similar to the Foote plan in many respects. There are many areas of agreement among the three plans as well as some differences. The State and U.S./City Board plans often flesh out the Foote plan and contain more specific criteria than proposed in the Foote plan, probably as a consequence of having additional time to prepare and file their plans.

At the request of the Court, on June 18, 1981, the court-appointed expert, Dr. Gary A. Orfield, also filed an educational plan for voluntary, cooperative desegregation of the schools in the St. Louis metropolitan area. This plan also draws substantially from the Foote plan.

The intervening plaintiffs, Adams, although not ordered to do so, submitted a proposal for metropolitan desegregation on April 27, 1981. It deals with 12(a), 12(b), and 12(c) plans. It suggests that a regional school district embracing St. Louis, St. Charles and Jefferson Counties and the City of St. Louis be established which would include several local school units. The regional school district and local school units would be governed by elected boards which would have power to deal with education in the metropolitan area.

A substantial problem is effectuating a desegregation remedy is providing for its costs. The Adams proposal was

the only one which submitted that a regional school district would be responsible for levying a uniform, equalized tax for education throughout the area and distributing such tax money to the boards of local school units. The proposal is based on the proposal of the Missouri School District Reorganization Commission issued in November of 1968.

After reviewing the similarities and differences among the various plans for voluntary desegregation and considering the record as a whole, the Court in issuing this order and in adopting the plan embodied herein seeks to draw from the best aspects of each of the proposed plans.

The Court held an evidentiary hearing on May 21, 26, 27, and 28, 1981, at which all parties were afforded an opportunity to call, examine, and cross-examine witnesses and to offer exhibits and such other evidence they deemed appropriate.

Dr. Robert Bartman, Administrative Assistant to the State's Commissioner of Education, testified on behalf of the State; Superintendent Robert Wentz and Dr. Gordon Foster testified on behalf of the City Board; Dr. David Bennett, Deputy Superintendent of Milwaukee Public Schools, testified on behalf of the Caldwell plaintiffs; and Dr. Gary Orfield, the court expert, as well as Dean Edward T. Foote, also testified.

All of the witnesses testified in agreement with the conclusion that this Court and the Court of Appeals had expressed: that a voluntary inter-district desegregation plan would be helpful in desegregating the remaining segregated schools in the City's school system.

Dr. Foster and Mr. Bennett described the results of similar voluntary plans in Milwaukee, Hartford, Rochester, and Boston. Those plans contained incentives for participating school districts similar to those in the proposed

12a plans, although in some cases at a much higher level of state contribution. None of the plans contained a tuition incentive for students similar to that proposed in the U.S./ City Board plan. The average level of participation in the plans was from 1000 to 1500 students going from the city to the suburbs, and from 150 to 200 students from the suburbs to the city.

Dr. Orfield considered the tuition incentive proposal to be an "exciting" idea and suggested implementation on a limited basis to determine its potential effect.

Mr. Bartman, on behalf of the State, testified that the State Board supported fiscal incentives for school districts but in no specific amount.

Dr. Orfield proposed that an expert be retained to design a pilot, or experimental, program to test this tuition proposal before the Court decides whether to order it implemented generally. The City Board supported Dr. Orfield's recommendation in this regard.

In addition, Dr. Orfield suggested that it may be too close to the start of the 1981-82 school year for the City Board to be successful in establishing new magnet schools which would open in September of 1981. Dr. Orfield urged that the City Board should focus on using and expanding its existing magnet schools.

Dr. Foster testified that the U.S./City Board plan promises to achieve a greater amount of actual desegregation than the State plan and is in many important respects far more specific and detailed than the State plan.

Dean Foote, who is highly regarded by all the parties, testified as to his activity in developing his plan as ordered by the Court. He testified he met with many individuals representing different interests and found there was much concensus among the various parties and sub-

urban districts. He indicated that the basic concept of the plan was voluntarism and would have a "good chance" of success. He testified as to the plan he submitted to the Court and the various components of his plan. He was cross-examined by several of the parties.

After consideration of the various 12a plans submitted to the Court; the evidence and argument submitted to this Court at the hearings held in May, 1981; the briefs and memoranda filed by the parties; the entire record in this ltigation to date; and the Court having concluded that the implementation of a voluntary plan can assist in effectuating compliance with the mandate of the Eighth Circuit Court of Appeals, the Court adopts and approves the following plan to alleviate desegregation in St. Louis. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the following plan be implemented beginning with the start of the school year 1981-1982.

PART TWO—THE PLAN

I. *General Characteristics*

These general characteristics apply to all of the following elements of the plan:

A. The plan is voluntary in philosophy and fact. This point is central to this plan and distinguishes it from other alternatives. The word "voluntary" as used throughout should be understood in its usually accepted sense, specifically:

No students would be required to attend any schools but those to which they would normally be assigned. The plan presents additional options and incentives for students, parents, and school districts. Every decision concerning the choice of schools and districts other than students'

home schools and districts would be made by students and their parents.

Participation in this plan is neither an admission of liability nor an element of proof of liability of any suburban school district in an inter-district school desegregation case.

A school district's participation in this plan would be voluntary. Each school district in the St. Louis metropolitan area is encouraged to make its own independent decision whether to participate in the plan.

B. This plan is designed to lead to an educationally sound and relatively expeditious means of promoting racial desegregation of the public schools throughout the metropolitan area, provided that a sufficient number of school districts in the metropolitan area agree to participate and the plan proves effective.

C. Voluntary acceptance of this plan by a participating district constitutes formal commitment toward furthering desegregation. All districts are encouraged to adopt any additional education or other programs that would reasonably further desegregation, whether or not they were part of this plan. By participating in the plan, each district acknowledges a responsibility not to engage in any purposeful and intentional segregative activities. Each participating district shall adopt procedures to ensure that transfers are prohibited if they would increase segregation.

D. The plan has three broad segments:

1. Permissive, inter-district transfers to existing programs that already have available space (or where space may be made available) when the transfer would decrease racial segregation;

2. Specialized "magnet" schools and "magnet" programs that could be either full-time or part-time;

3. Educational programs designed to increase and promote constructive experiences for students of different races, but not necessarily in traditional "academic" settings or within or by virtue of association with schools.

II. *Definitions*

For purposes of this order, the following terms are defined below:

"Home District" means the participating district which is the district of residence of the student transferring to another district pursuant to this plan.

"Host District" is the participating district which receives a student who transfers from another district pursuant to this plan.

"Magnet Program" means a specialized educational offering in an existing school or elsewhere that students would choose for part of their educational experience while retaining primary affiliation with their "home" schools.

"Magnet School" means a school offering a specialized program of instruction to students assigned there on a full-time basis.

"Metropolitan Area" includes the City of St. Louis, St. Louis County, St. Charles County, and Jefferson County.

"Participating Districts" means those districts that voluntarily decide to participate in the plan.

"Part-Time Integrated Programs" are educational activities in which students from two or more schools cooperatively engage, usually at an educational, cultural, or governmental institution other than the participating schools. At least one of the paired schools must not have a majority black enrollment.

"Plan Ratio" means a racial ratio of students in the schools of the participating district of seventy-five percent white—twenty-five percent black. The evidence and pleadings represent that the racial ratio in the St. Louis metropolitan area is seventy to eighty percent white. The Racial Ratio of this plan reflects both the long-range central objective of the plan and the necessity of certain realistic limitations on effort to achieve the Racial Ratio.

"Regular Programs" are non-magnet school programs. In the St. Louis public schools, regular school programs are generally organized in the following grade configurations: Kg.-5, Kg. 6-8 and 9-12.

"Space Available" is the number of individual spaces for students within a school district not being filled by resident students of the district. Space available in a district is based upon building capacity and resident student enrollment. In initially determining what space is available in their district, participating districts shall consider the following:

Currently unused but suitable space (e.g., closed buildings) may be considered as potential available space in determining the number of transfer students a participating district can accept.

Students who choose to participate in magnet schools and programs will open up space in their home districts. An estimate of the number of students in each district who will enroll in magnet schools shall be made by participating district and an appropriate adjustment made in its estimate of the space available in its district.

The formula for computing spaces available on an individual school basis shall be: total number of classrooms in building available for regular grade in-

struction minus classrooms used for special purposes times pupil teacher ratio minus anticipated enrollment equals space available.

School districts receiving transfer students will be reimbursed for expenses of all transferring students and, thus, aided in hiring additional staff as necessary to accommodate transferring students.

"Students" includes pre-school, elementary, and secondary students throughout the St. Louis metropolitan area.

III. *Permissive, Inter-District Transfers to Existing Programs*

A. Students who are members of the racial majority of the student population at a school in any participating district have the right to transfer voluntarily to a school and district in any other participating district in which they would be in the racial minority on certain conditions. The following provisions shall govern the operation of permissive inter-district transfers:

1. A student whose race is in the majority in the home district is eligible and has a right to transfer to a host district and school where the student's race is in the minority only when space is available in the host district and host school.

2. Each participating district shall list the number and grade level of transfer students it can currently accommodate without opening additional schools or hiring staff at the time it accepts this plan.

3. The host district will determine the space available in the host district and host school pursuant to the definition of space available set forth herein so that no student in the host district will be displaced by a permissive inter-district transfer student.

4. The host district shall provide the same educational and related services to the permissive transfer student as are provided its own students. The commitment to accept the student shall be for the duration of the student's voluntary participation in the plan.

5. Participating districts shall provide information to the Coordinating Committee (*see infra*) on space available by school and by grade. Information shall also be provided for dissemination that will include mention of the special characteristics of each school with available space, including program strengths, enrollment, racial composition, extracurricular activities, parent organization, location, and any other information that would reasonably be expected to assist parents and students in making an informed choice.

6. An eligible student may apply for a specific school in a host district in which available space has been identified. A student may list several choices of schools in the order of preference to allow for the possibility that space in the school of first choice is filled prior to the processing of the application. The host district shall accommodate these student preferences to the extent possible.

7. Participating districts shall actively promote the permissive inter-district transfer program through positive discussions and presentations to their students, through the distribution of written information about the choices available, and by other appropriate means.

8. Permissive interdistrict transfer applications shall be approved for eligible students by the Recruitment and Counseling Centers (*see infra*) under the supervision of the Coordinating Committee on a first-come, first-served basis, subject to the following priorities:

a. Black students who live in the City of St. Louis

and white students who live in majority white county districts.

b. Any eligible black student attending a school with an enrollment that is ninety percent or more of the student's race.

c. All other eligible applicants.

9. After the first year of the operation of the plan, students must exercise their right to transfer before March 1 of each year to be eligible for priority consideration. After that date each year, they would be treated like any other student from another participating district on a first-come, first-served basis. Once a student exercises his or her right to participate in the plan, the student will continue in said plan until the student affirmatively withdraws from participation as herein set out.

10. The host district shall honor the grade placement for the student as certified by the home district.

11. A permissive transfer student may elect to return to the home district by giving notice to the host district in compliance with this plan, i.e., by March 1 of the preceding year, without penalty to a host district that had fully complied with this plan.

12. The host district shall acknowledge the acceptance and enrollment of a permissive inter-district transfer student. The acknowledgement of acceptance shall include a written notification of acceptance to the student and/or parent as practicable, the home district, and the Director of the Recruitment and Counseling Centers. Should the transfer be terminated, a written acknowledgment shall be provided the student and/or parent as practicable, the home district, and the Director of the Recruitment and Counseling Centers.

Participating districts shall also exchange student transcript information as needed.

13. All applications for permissive transfers shall be processed by the Recruitment and Counseling Centers. The Centers shall keep up-to-date records on space available in participating districts and on all permissive inter-district transfer students and the status of such transfers.

14. Any students transferring inter-district for any program shall meet the same criteria for admission and responsibilities that apply to students of the host district.

15. Once admitted, permissive inter-district transfer students will be expected to meet the same general standards, academic and other, as applied to students of the host district. Once admitted, permissive inter-district transfer students shall be eligible to participate in all school programs (academic, athletic, extracurricular and other) and shall not suffer any disability or ineligibility because they are permissive inter-district transfer students.

16. Participating districts shall apply disciplinary standards and procedures in a non-discriminatory manner. Each participating district shall develop procedures to ensure that permissive inter-district transfer students are not resegregated through educationally unjustified assignments.

17. Students who have demonstrated disruptive behavior in their home district may be prohibited from participating in the permissive inter-district transfers. All participating districts shall notify others and provide any available, substantial evidence of disruptive behavior of a student proposing a permissive inter-district transfer to another participating district. Prior to any student's transfer, the home district shall issue a statement that the transferring student has not demonstrated disruptive behavior.

B. Subject to space available, each participating district with a student population that is majority white shall

accept up to as many black permissive inter-district transfer students as would constitute fifteen percent of the total student population in that district, except that no participating district shall be required to accept more black permissive inter-district transfer students than would raise the overall percentage of blacks in the total student population higher than twenty-five percent. Subject to space available, a participating district that is majority black would similarly accept white transfers up to the "Plan Ratio." Nothing in this section shall be construed to prohibit any participating district from exceeding the plan ratio if in doing so it furthers racal desegregation.

C. Without regard to space available or the plan ratio, and so that all participating districts have the opportunity to participate in student transfers, each participating district with an enrollment of 8,000 students or less shall make available each year at least fifty spaces, and each participating district with an enrollment of over 8,000 students shall make available at least 100 spaces. In each succeeding year, such participating districts at a minimum shall agree to make available for transfers under this plan additional spaces equivalent to an additional one percent per year of its current resident enrollment until the district's enrollment reaches the plan ratio. Any participating district which does not receive sufficient transfers to fill these minimum spaces shall actively recruit students to fill those spaces.

D. Once students exercise their right to participate in the plan, they will continue in said plan until they affirmatively withdraw from participating by notifying the host district on or before March 1 of any school year for withdrawal from the succeeding school year.

E. Students who have elected to transfer under this plan shall remain students of the host district until they

choose to return to the district where they reside. These students will not have to transfer each year or exercise a transfer choice to remain in the host district.

F. The City Board shall affirmatively recruit white students under this plan, and other participating districts shall cooperate in this effort.

G. If more permissive interdistrict transfer students apply to attend school in a participating district than there are spaces available, these students may list additional choices of host districts in order of preference, and they shall be placed in another host district of their choice if possible.

IV. *Magnet Schools and Magnet Programs*

Magnet schools and magnet programs are a very important part of a voluntary plan for desegregation. Magnet schools and programs offer specialized educational programs which cannot be offered in a school that does not draw students from a large area. Magnet schools and programs have been a very successful element in the City's desegregation plan. Therefore, provided a sufficient number of participating districts agree to accept this plan as determined by this Court:

A. The number of magnet schools in the metropolitan area shall be increased as follows:

1. Two new magnet schools shall be created in the City of St. Louis, patterned after "Individually Guided Education" at Woerner (1-8) and the "Academy of Basic Instruction with the Mastery Learning Approach" at Lyon (Kg.-8) (kindergarten will be all day and magnet). These two new magnet schools will begin operation at the start of the 1981-82 school year if the City Board determines this to be feasible. If it is not feasible, then these two

new magnet schools shall open in time for second semester of the 1981-82 school year.

2. Two existing magnet schools shall be expanded. Stix Investigative Learning Center shall become a 5-8 (Kg. for neighborhood) center, while a 1-4 Investigative Learning Center shall be established at Mason School. The Visual and Performing Arts Center at Shaw School shall become a 5-8 (Kg. for neighborhood) center and a 1-4 Visual and Performing Arts Center shall be set up at Gardenville School. These expanded magnet schools will begin operation in the 1981-82 school year if the City Board determines this to be feasible. If it is not feasible, then they shall be expanded in time for the second semester of the 1981-82 school year.

4. The participating districts, working through the Coordinating Committee, may develop such other magnet schools and programs as they believe are educationally justified and will facilitate the goals of this plan. Such magnet schools and programs shall not duplicate undersubscribed magnet schools or programs offered in the City of St. Louis.

B. Subject to the basic principle of fifty percent white to fifty percent nonwhite racial enrollment in the magnet schools:

1. Students from suburban school districts who apply for admission to existing magnet schools in the City of St. Louis shall be admitted on a first priority basis, if their transfer from the district of origin does not increase racial isolation in that district or in the magnet school.

2. Existing magnet schools to be expanded shall admit students according to the following policy:

a. The present enrollment of the school will be given first preference.

b. Second preference will be given a member of the race which is a minority at the magnet school in question.

3. New magnet schools created pursuant to this plan shall admit students according to the following policy:

a. Priority consideration will be given to black city students and white county students.

b. Second preference will be given to white city students and black county students.

C. All applicants to magnet schools or magnet programs shall make formal application to one of the Recruitment and Counseling Centers for processing. Working cooperatively, the centers will send to individual students one of the following: notices of acceptance and assignment; notices of acceptance and placement on waiting lists; and notices of rejection. A time line will be developed by the Coordinating Committee providing cut-off dates for each priority of students.

V. *Part-Time Educational Programs*

A. *Part-Time Ancillary Programs.* Many of the part-time ancillary programs are presently in operation in the St. Louis public schools and shall be expanded to include participating districts.

Among those programs presently in operation which shall be expanded are the following:

Pairing and Sharing

The Law and Education Project

Springboard to Learning

Career Education

The School Partnership Program

Ethnic Heritage

Radio Station KSLH

Another program which shall be expanded for the benefit of both city and county students is the English as a Second Language (ESL) program. This program is presently operational in three schools that have been designated as ESL Centers. Students must be enrolled in the school and show need of ESL services before they can participate.

Additionally, cultural/educational institutions with long-standing and enviable records for their educational programs for school children as well as the adult community have made commitments to participate cooperatively in programs specifically designed to bring together students from city and county schools. They have well-trained staffs and well-equipped facilities for extending learning experiences beyond conventional classrooms to the broader environment of the community and the world at large. The institutions involved are:

KETC-TV

McDonnell Planetarium

Missouri Botanical Garden

Missouri Historical Society

Museum of Science and Natural History

Saint Louis Art Museum

Saint Louis Symphony

Saint Louis Zoo

United Nations Association

Urban League Library

The voluntary integration program to be offered by these institutions will be a cooperative effort between each

institution and the participating schools. As a first step, the institutions will establish certain general guidelines for their respective programs and extend the opportunity for participation to schools in the city and county. Faculty members and administrators will recommend students for participation in the programs.

While the format and scope of the programs will vary from institution to institution, each will have a common denominator: To bring together racially mixed groups of students from the metropolitan area districts periodically for programs of unique educational value.

Additionally, it is envisioned that cable television could become an integral part of the metropolitan voluntary plan.

B. *Part-Time Specialty Programs.* Students enrolled in part-time specialty programs shall attend classes a half-day for a complete semester or a full year. These programs include:

Honors Art

Honors Music

Public Safety

Transportation

Mass Media

A student may participate by enrolling in that high school or by spending one-half day in his/her home school and the other half in the high school of the specialty. Honors Art and Honors Music shall be in a school setting which houses only these programs. For these last two programs, students must spend one-half day in their home school and the other half day in Honors Art or Honors Music Programs. Public safety classes will be held at the Police Academy or Fire Academy. All specialty programs are at the secondary level.

C. *Policies and Procedures*

1. Pupils must apply for admission into part-time specialty programs and will be admitted on a first-come, first-served basis with consideration being given to racial balance.

2. Part-time ancillary program experiences will be cooperatively planned and implemented by staff at the participating schools and institutional staff where appropriate with due consideration being given to racial balance.

VI. *Staff Exchanges*

A. *Description*

The success of a metropolitan desegregation plan will be facilitated by the provision of personnel with understanding and sensitivity for the concerns and needs of students and parents involved in new experiences at unfamiliar sites. Staff exchanges allow for meeting this need by making available in host districts professional personnel from the home districts.

Staff personnel in various capacities may agree to work in a district other than their home district for a specified period. During that time, they would report to and operate under all rules and regulations of the district in which they are working.

Basic assumptions for staff exchanges follow:

1. That the district from which a staff member comes shall continue to pay that person on the salary scale for that district.

2. That teachers and administrators will have an opportunity to confer prior to the assignment.

3. That all arrangements as to the number of staff that would transfer and the duration of such transfer shall be reached cooperatively between the home district, host district, and the teacher or administrator involved.

4. That opportunity for flexibility shall be built into these arrangements with consideration toward achieving racial balance.

B. *Policies and Procedures*

Staff exchanges involve a staff member from one district volunteering to work in another district in the same capacity he or she is presently serving, unless otherwise agreed upon.

The following guidelines, consistent with the purposes of this plan and subject to whatever revisions are mutually determined as necessary by participating districts, will be followed in implementing staff exchanges.

1. A staff member of satisfactory or above rating may volunteer to participate in the staff exchange program.

2. Short term one-to-one staff exchanges may occur as follows:

a. Principal of school A in the city or county will serve in school B in the city or county for a month, two months or whatever the agreed upon time.

b. Other staff of school A in the city or county will serve in school B in the city or county for a month, two months or the agreed upon period of time.

c. Long-term voluntary exchanges would involve a staff member declaring willingness to serve in a district other than the one to which presently assigned for a semester, a year or an indefinite period of time.

d. Guidelines by the Coordinating Committee would be established for staff exchanges to assure compliance with Court orders.

e. No district would displace present personnel to accept personnel from another district.

f. Teachers who participate in staff exchanges

would attend workshops/seminars which would help prepare them for their new assignments.

VII. *Parent and Community Involvement*

A. *Description*

One of the current thrusts in education nationwide is the concept of parent involvement in schools. At many local levels throughout the United States, boards of education have organized and implemented departments which function in this particular capacity. The focus of such programs is to improve the quality of education for children.

Parent involvement program centers shall be established in strategic places throughout the entire metropolitan area. Parents will be provided a comfortable setting in which to learn about the developmental stages of children, how to develop positive self-concepts in their children, how to provide meaningful assistance with school work and through participation in field experiences, and how to provide meaningful trips to places of interest for their children.

Activities such as slide presentations, seminars and group discussions will be utilized in assisting parents to gain knowledge and skills in helping their children. Topics would include programs from The Master Package for Bowdoin Method, i.e.:

Parents and Teachers

Vocabulary Building

How Your Child Learns

Words That Win Children

Instead of Nagging

The Importance of Good Feelings

How Things Look

Getting Ready for Reading

Help Your Child Read Better

Parent and community organizations in conjunction with respective school staff would work cooperatively to open and keep open the lines of communication between school, home and community.

B. *Policies and Procedures*

The Coordinating Committee shall submit recommendations for the parental involvement program centers, including:

- identifying public information liaison persons to be assigned where needed.

- suggesting parental involvement specialists to be assigned where needed to serve as technical assistants to school principals, parents and community groups; and

- providing training in developing communication, leadership and parenting skills.

VIII. *Transportation*

A. The Missouri State Department of Elementary and Secondary Education shall provide the expertise to resolve the details of routes, distances, and kinds of appropriate transportation as the specifics of the plan to be adopted are determined.

B. The transportation plan finally approved by the State Department of Elementary and Secondary Education shall include the following:

1. Transportation will be provided for inter-district permissive transfer students enrolled in regular or magnet programs who reside more than one mile from the school site.

2. Transportation will be provided for students en-

rolled/participating in part-time ancillary programs and half-time specialty programs.

3. Board owned and operated buses of participating districts will be used to transport students where possible, and contracted bus service will be utilized where necessary.

4. Students will be provided with bus passes where feasible.

C. The State Department of Elementary and Secondary Education shall be responsible for negotiating transportation contracts for the purpose of transferring students participating in the plan. All transportation contracts and routes established pursuant to this plan shall be approved by the State Department of Elementary and Secondary Education.

IX. *Administrative Coordination*

A. *Coordinating Committee*

1. A "Coordinating Committee" shall be established to supervise and manage this plan and shall be organized and constituted within forty-five days of the date of this order. It shall exist as long as this plan exists.

The Coordinating Committee shall include one professional administrator selected by each participating school board, one city teacher selected by the American Federation of Teachers, and one suburban teacher selected by the Missouri Education Association, as well as one city parent selected by and serving on the Court's monitoring committee and one suburban parent serving on the Council of the Cooperating School Districts of St. Louis County. The Coordinating Committee shall include a representative of the State Department of Elementary and Secondary Education, selected by the Commissioner of Education.

Each person shall be appointed for a term of one year.

If the appointing authority fails or refuses to make an appointment, the Court shall select a representative. If a vacancy occurs, the appointing authority shall make a new appointment; if the authority fails to do so, the Court shall select a representative.

Each participating district shall name its representative to the Coordinating Committee within ten days after it accepts the voluntary desegregation plan. All other authorities entitled to designate a representative on the Coordinating Committee shall submit the name of their nominee wihin forty-five days of the date of this order.

2. The purpose of the Coordinating Committee is to coordinate, to oversee generally, and to plan for and make recommendations concerning the plan. The Committee shall adopt such by-laws, rules and operating procedures not inconsistent with this plan or court orders as it may deem necessary and shall submit the same for approval by the Court. The Committee shall file an initial staff budget, organization, and membership report to the Court no later than September 15, 1981.

3. The Coordinating Committee shall have a full-time staff of sufficient size to ensure the efficient implementation and operation of the plan. A director shall be named to head this staff.

The Court believes that the success or failure of the plan will depend in large measure on the actions taken by the parties within the next thirty days. To the end that these activities may be most effectively coordinated, the Court designates Susan Uchitelle, the Missouri Supervisor of Instruction for Area A, as interim director.

4. The Coordinating Committee and its staff shall, in cooperation with the participating districts, be responsible for developing policies and procedures to implement

and operate all aspects of the plan. In particular, it shall be responsible for developing policies and procedures for:

a. Part-time educational programs;

b. Staff exchanges;

c. The parent and community involvement programs.

These policies and procedures shall be developed in a manner consistent with the principles set forth in the plan. They shall be developed and submitted to the Court for approval as soon as practicable, but not later than December 31, 1981.

5. The Coordinating Committee and its staff shall assist participating districts in the functions listed below:

a. Planning and implementing new magnet school programs.

b. Developing polices and procedures related to the plan.

c. Supervising recruitment and counseling in student exchanges.

d. Coordinating dissemination of information on programs to the community.

e. Assisting in identifying possible sites, building capacities and spaces available.

f. Assisting in developing and implementing an effective system for transporting students.

g. Coordinating services in the area of safety and security.

h. Coordinating staff development activities in order to prepare staff to function in integrated settings.

i. Developing guidelines for staff exchanges to assure compliance with Court orders.

j. Preparing annual budgets for submission to this Court.

k. Coordinating other administrative activities as needs become apparent.

6. Should it be determined by the Coordinating Committee that special centralized management and instructional support services are needed to implement the plan (e.g., food service, data processing, purchasing, staff development, audio-visual services) such services may be authorized by the Coordinating Committee. All participating districts shall be eligible to share in these centralized services.

7. The Coordinating Committee shall report every six months to the Court on the current status of all activities going forward under the auspices of the plan with the first report due January 1, 1982.

B. *Recruitment and Counseling Centers*

1. The existing Recruitment and Counseling Center in the City of St. Louis shall continue to function as per the St. Louis public schools desegregation plan. A new Recruitment and Counseling Center for this voluntary plan shall be established in a central location in St. Louis County. This Center shall have a full-time staff of sufficient size to ensure the efficient implementation and operation of the plan and shall report to the Court within six months of its establishment regarding its personnel, policies, and activities actually conducted.

2. The Recruitment and Counseling Centers, with their staffs increased by representatives from participating districts and under the supervision of the Coordinating Committee, shall process all applications for permissive transfers, conduct recruitment drives in the participating districts, conduct related advertising campaigns, and co-

ordinate the development and dissemination of information about the choices available to students.

The Recruitment and Counseling Centers shall keep up-to-date records of all permissive inter-district transfer students and the status of such transfers.

3. These centers shall be coordinated by a Director of Recruitment and Counseling Centers under the supervision of the Coordinating Committee. The city summer satellites will continue to be located in the southeast, southwest, northeast and northwest sections of the city. Additional satellite stations may be established in St. Louis, Jefferson, and St. Charles Counties as the need may arise upon application to the Court.

Any student involved in this plan, either in a part-time specialty program or in a full-time program, will be processed through the Recruitment and Counseling Centers. Students involved in part-time ancillary programs will not be processed by the Centers. The costs of these centers and any necessary support staff shall be included in the budget of the Coordinating Committee and shall be funded by the State of Missouri.

X. *Finances*

A. During the first year's operation of this plan, for each student who voluntarily transfers from his or her district to a host district, the home district will receive one-half of the state aid it would have received had the student remained in his or her home school. Each host district shall report its average cost of educating a student to the Coordinating Council. The State shall reimburse the host district for the first $1,250 of the average cost for each transfer student, and shall reimburse fifty percent of the additional average cost over $1,250. The State shall calculate how much money would have been

paid in state aid to the home districts from State foundation funds had the transfer students remained in their home districts. That sum shall be applied to the costs of this plan and shall continue to be charged to the foundation funds. Additional costs required by this plan, however, shall not be funded from foundation funds. Students who are accepted in a host district shall not be required to pay any fee to the host district as an out-of-the-district student.

After operation of the 1981-82 school year, the Court shall review the matter and enter the appropriate orders as to these costs.

B. All other costs or expenses of this plan for the first year shall be borne by the State of Missouri. This includes the start-up costs and building modification costs of new magnet schools and expanded magnet programs; parent and community involvement centers and part-time educational programs; transportation of transferring students; and the operating expenses of the Coordinating Committee, its staff, and the expanded Recruitment and Counseling Centers. If the City Board, the State, or other participating districts obtain ESAA Out-of-Cycle Assistance Grants, or other funds, the amount of such funding shall be deducted from the State's funding requirement for the plan.

C. No later than March 1, 1982, the Coordinating Committee shall, and the State of Missouri or any other party participating in the voluntary plan may, submit a budget to the Court to fund this plan for the ensuing year.

XI. *Participation in Plan*

A. The State Department of Elementary and Secondary Education of Missouri shall, within five days of the

entry of this order, distribute it to the superintendents of all school districts in the metropolitan area. All school districts located in the metropolitan area shall have until August 6, 1981, to advise the Clerk of this Court of their intention to become participating districts for the school year 1981-82 and their acceptance of all of the terms and conditions of this order. Thereafter, when non-participating school districts wish to join this plan, they shall advise the Court, on or before January 31, of their intention to become a participating district for the ensuing year.

At the time of accepting the plan, each participating district shall submit space available and information required for dissemination to the Coordinating Committee. Within ten days after acceptance, each participating district shall name its representative to the Coordinating Committee.

B. Any participating district shall have the right to withdraw from the plan for the ensuing school year, if it notifies the Court and the Coordinating Committee prior to March 1 of its intention to do so. Voluntary inter-district transfer students currently attending a participating district which elects to withdraw from the plan shall have the right to remain in their host school and the withdrawing home district shall continue to receive state aid as per this order until such time as the students graduate or leave the district, unless the Court upon good cause shown directs otherwise. Voluntary inter-district transfer students in such circumstances shall continue to enjoy all the rights and protections afforded by this plan.

C. The plan submitted by the United States/City Board contains a provision that each permissive transfer student would receive one year free education in a Missouri institution of higher education for every two years of voluntary permissive transfer. Before adopting this

novel approach, the Court directs the parties to make recommendations concerning potentials and limitations of this concept and suggestions as to how it may be used on an experimental basis. The parties shall also compare the costs of a tuition-credit concept with other educational programs employed to reduce segregation. The parties are encouraged to seek the aid of educational experts. The Court may also receive suggestions from the Center for Social Organization of Schools at Johns Hopkins University and its own experts.

D. The Court may thereafter consider the possible approval of the implementation of a model tuition-credit program.

XII. *General Provisions*

A. All participating districts are required not to engage in any purposeful segregative activities and shall adopt procedures to ensure that transfers shall be prohibited if they would increase segregation.

B. Participation in this plan by any school district shall not be deemed an admission of liability nor an element of proof of liability in any inter-district school desegregation case.

C. All previous orders of this Court not inconsistent herewith remain in full force and effect.

D. Given the broad geographic dimensions of the plan, practicalities of participation by individual districts may require slight variations in the plan. The Court will consider any suggestions or responses which are consistent with the desegregation purpose of this plan, from any suburban school district which will participate in the plan. Such responses shall be submitted within twenty days.

E. This Court retains jurisdiction of this action for all purposes, including the entry of such additional orders as may be necessary or proper.

PART THREE—LEGAL ASPECTS

The Court finds that this voluntary plan meets constitutional and judicial standards. The plan adopted herein is, in the opinion of the Court, fair, adequate and reasonable; educationally sound; and conducive to obtaining a proper level of constitutional compliance and will aid in eliminating the remaining vestiges of school segregation.

The plan constitutes a valid effort to implement the mandate of the United States Court of Appeals in Adams mandate of the United States Court of Appeals in *Adams v. United States,* 620 F.2d 1277, 1296 (8th Cir.), *cert denied,* 101 S.Ct. 88 (1980):

> . . . The Board shall use other techniques to ensure students in all schools will receive equal educational opportunities. It shall seek the help of the state and federal governments in financing them. These techniques may include the following:
>
> > . . . (2) Developing and implementing programs providing less than full-time integrated learning experiences,
> >
> > (3) Developing and implementing a comprehensive program of exchanging and transferring students with the suburban school districts of St. Louis County. The Board shall seek the cooperation of such school districts, the State Board of Education and the United States in developing and implementing such a plan. 620 F. Supp. at 1296.

This plan is also in accord with Judge Meredith's order of May 21, 1980, 491 F.Supp. 351, 353, to make

> every feasible effort to work out with the appropriate school districts in the St. Louis County and develop . . . a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein. . . .

The Court finds that the plan herein ordered would aid in reducing racial isolation and segregation in St. Louis. The Plan is designed to lead to an educationally sound and relatively expeditions means of promoting racial desegregation of the public schools throughout the metropolitan area, provided that a sufficient number of school districts in the area agree to participate in the plan and the plan proves effective.

A desegregation plan is not disapproved merely because it is voluntary. *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), holds that the standard of a voluntary plan is the adequacy of the plan.

> The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Board of Education, 402 U.S. 1, 15 (1971).

In *Milliken v. Bradley,* 433 U.S. 267 (1977), the Supreme Court said that application of these equitable principles required the federal courts to focus on three factors: (1) that the remedy is related to the condition alleged to offend the Constitution, (2) that the decree is indeed remedial, that is, it is designed to restore victims to the position they would have occupied absent the violation, and (3) that the remedy take into account the interests of state and local authorities in managing their own affairs,

consistent with the Constitution. 433 U.S. at 380-81. The Supreme Court has

> recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court."

Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring).

The plan is purely voluntary. By participating in such a voluntary plan, the suburban school districts would enrich the educational opportunities for all children, would decrease racial isolation, and would enhance other cooperative efforts in the metropolitan area.

Pursuant to the mandate of the Eighth Circuit Court of Appeals, this Court can countenance no further delay in elimination of the vestiges of racial segregation in the St. Louis public school system. Participation in this voluntary plan would be a factor in weighing the necessity of a compulsory inter-district plan. However, if the goal of constitutional compliance cannot be met through this voluntary plan, the Court must give serious consideration to the validity of the imposition of a compulsory inter-district remedy.

The plan is directly related to remedying racial segregation in St. Louis, which is the condition alleged to offend the Constitution. The plan is remedial in nature, both with respect to educational components and in the effort to provide integrated educational opportunities to students in St. Louis. Finally, the plan takes account of the interest of parents, students, and school boards in managing their own affairs.

Dated this 2nd day of July, 1981.

/s/ William Hungate
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Craton Liddell, et al,

and

Earline Caldwell, et al,

City of St. Louis,

Janice Adams, et al,

and

Mary Puleo, et al,

United States of America,

Appellees,

vs.

Board of Education of the City of St. Louis, et al,

and

State of Missouri, et al,

Special School District of St. Louis County,

St. Louis County, et al,

and

Affton School District, et al,

Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 81-1828—Adams Group

No. 81-1940—State of Missouri and Officials

No. 81-2003—St. Louis City Board of Education

No. 81-2042—Caldwell Group

No. 81-2043—St. Louis City Board of Education

No. 81-2086—Riverview Gardens School District

No. 81-2127—Hazelwood School District

No. 81-2134—St. Louis County Governmental Officials

No. 81-2135—Mehlville Board of Education

No. 81-2136—Lindbergh and Affton School Districts

No. 81-2137—Rockwood Board of Education

No. 81-2138—Webster Groves Board of Education

No. 81-2139—Parkway School District

No. 81-2140—Ladue School District

Submitted: January 11, 1982

Filed: February 25, 1982

Before, HEANEY, BRIGHT and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

Questions concerning the integration of the public schools of the City of St. Louis have been before this Court

on numerous occasions and before the United States Supreme Court three times.[1] Pursuant to our opinions and those of the United States District Court for the Eastern District of Missouri, some steps toward the goal of an integrated school system have been taken. The previously all-white schools in South St. Louis have been integrated. Some integrated educational programs and opportunities have been provided to the 30,000 black students who still attend all-black schools, and efforts are being made to improve the quality of education in those schools. A number of integrated magnet schools have been opened. A start has been made toward integrating the vocational education programs of the city and county schools. In addition, a modest beginning toward voluntary interdistrict desegregation has been undertaken. As in many school districts with a long history of racial segregation, progress has been slow. Firm direction, however, has been provided by former Chief Judge William Hungate.

The major questions presented in these appeals may be grouped into four categories:

(1) *Desegregation Costs.* Did the district court err in determining the share of the 1980-1981 costs for desegre-

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[1]We have filed three major opinions in this litigation: *Liddell* v. *Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir. Feb. 13, 1981), *cert. denied*, 50 U.S.L.W. 3447-3448 (Nov. 30, 1981) (*Liddell II*); *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980) (*Adams*); and *Liddell* v. *Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) (*Liddell I*).

We have also filed two orders which are referred to in this opinion. *Liddell* v. *Board of Education*, Nos. 81-1184, et al (8th Cir. Dec. 2, 1981) (order) (*Liddell IV*); and *Liddell* v. *Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 & 80-1735 (8th Cir. Mar. 19, 1981) (order) (*Liddell III*).

The shortened reference form designated in the parenthetical following each citation will be utilized for subsequent citations in our opinion.

gating St. Louis schools that the State of Missouri was obligated to pay; in determining that the state would be required to pay one-half of the actual desegregation expenses in the 1981-1982 budget; and in determining that the state was required to pay certain costs relating to the implementation of the voluntary interdistrict plan.

We hold that it did not err in any of these rulings. We urge the State of Missouri to participate in the budget-making process so that the annual budget can be determined on a cooperative rather than an adversary basis.

(2) *Vocational Education.* Did the district court err in adopting a plan for the merger of vocational educational programs of the city and county schools and in requiring the state to pay certain costs relating to the merger.

We hold that it did not and emphasize the necessity of closely monitoring the plan to ensure that the integration goals set forth therein are promptly and fully met.

(3)(a) *Joinder of Suburban Districts and County Units of Government.* Did the district court err in joining St. Louis County, certain county officials and seventeen suburban schools in St. Louis County as parties-defendant in the pending case and in postponing a decision as to whether other suburban school districts and governmental units should be joined.

We hold that we are without jurisdiction to consider these questions.

(b) *The 21(c) proceedings and interdistrict relief.* Did the district court err in severing the issue of mandatory interdistrict relief from the pending paragraph 12(c)[2] pro-

[2]In its order of May 21, 1980, the district court directed, in paragraph 12(c), that the state defendants and city board develop and submit a suggested plan of interdistrict school desegregation necessary to

(Continued on next page)

ceedings and in requiring that the latter proceedings go forward immediately even though questions relating to the liability of suburban school districts and county defendants have not been adjudicated and even though no suburban school districts are parties to the 12(c) proceedings.

We hold that the severance order is not presently appealable, but suggest that the interdistrict liability proceedings be temporarily postponed until after the district court has entered its order in the pending 12(c) proceeding and that they go forward promptly thereafter. In so holding, *we note that relief granted in present 12(c) proceeding must be based on the established liability of the state defendants and the Board of Education of the City of St. Louis. We emphasize that suburban school districts that voluntarily participate in efforts to integrate city schools will not, by such participation, admit liability or waive any right that they may presently have to be excluded from a plan of mandatory interdistrict desegregation.*

(4) *Recusal.* Did Judge Hungate err in failing to recuse himself from conducting further proceedings in the intradistrict aspects of this case, including the paragraph 12(a)-12(d) proceedings, or in recusing himself from its interdistrict component.

Footnote continued

eradicate the remaining vestiges of government-imposed school desegregation in the City of St. Louis and St. Louis County. *Liddell* v. *Board of Education*, 491 F.Supp. 351, 353 (E.D. Mo. 1980). We expressly affirmed paragraph 12(c) both as originally entered, *Liddell II*, slip op. at 19-20, and as subsequently amended by the district court, *Liddell III*, slip op. at 13-17. Paragraph 12(c), as we subsequently observed, "essentially requires the development and submission of proposed interdistrict desegregation plans * * *." *Liddell IV*, slip op. at 8.

Paragraph 12(c) apparently has confused many parties. As a result, we discuss that provision in Part (3) (b), *infra*.

We hold that we are without jurisdiction to entertain an appeal on these recusal issues and we deny mandamus relief. We observe, however, that no legal basis appears to support Judge Hungate's recusal from either phase of the case. This case was originally assigned to Judge Hungate by Chief Judge H. Kenneth Wangelin. On remand, the Chief Judge may, if he deems it in the interests of judicial administration, reassign Judge Hungate to the interdistrict phase of the case or assign that phase to another judge.

(1) *Desegregation Costs.*

Two appeals have been filed with respect to payment of the costs of integrating the city schools. In No. 81-1940, the state renews its contention that it cannot be required to pay the costs of implementing a 12(a) plan for voluntary pupil transfers between the city schools and those of St. Louis County. It also asserts that the district court erred in approving the city school budget for Year Two of the desegregation plan and in requiring it to pay one-half of the desegregation costs for that year. In No. 81-2003, the Board of Education of the city schools challenges the district court's determination with respect to the costs of desegregation that are to be borne by the state for the 1980-1981 school year.

(a) *The State's Liability Under 12(a).*

We held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis.[3] No appeal was taken from that decision by the state. That decision has been settled and will not be reopened. *See generally United States* v. *United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 198 (1950); 1 B. Moore's Federal Practice ¶ 0.404, p. 401-405 (1980). In addition, we specifically sustained the validity

[3] *Adams, supra*, 620 F.2d at 1294 & n.27, 1295 – n.28. *See also Liddell II*, slip op. at 28.

of paragraph 12(a) of the district court's order of May 21, 1980, in our February 13, 1981,[4] decision. The Supreme Court denied certiorari review of that decision on November, 1981.[5]

Paragraph 12(a) is entirely enforceable against the state defendants; they are primary constitutional wrongdoers and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district. Hills v. *Gautreaux*, 425 U.S. 284 (1976).

(b) *The Desegregation Budgets (1980-1981 and 1981-1982).*

In our February 13, 1981, decision, we affirmed the district court's plan for integrating city schools. *Liddell II*, slip op. at 10, 12-25. We also affirmed the district court's order which required the state to pay one-half of the actual costs of implementing that desegregation plan in four equal installments. *Id.* at 28-29. These determinations are the law of the case.

The desegregation plan was implemented by the city

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[4]*Liddell II*, slip op. at 19. Paragraph 12(a) directed the state defendants and city board to "make every feasible effort" to work out a voluntary plan of interdistrict pupil exchanges between the city school district and the suburban districts. *Liddell* v. *Board of Education, supra*, 491 F.Supp. at 353. *See also Liddell III*, slip op. at 13-17; *Liddell II*, slip op. at 19.

Paragraph 12(a) was designed to help remedy the proven unconstitutional segregation of the city schools as part of and in conjunction with the overall desegregation plan which we approved in *Liddell II*.

[5]*See* n.1, *supra*. In its petition for a writ of certiorari, the state contended in part that the district court exceeded its authority in orde g the preparation of a voluntary interdistrict pupil exchange plan (paragraph 12(a)) because an interdistrict violation was neither pleaded nor proven and it should not be held responsible to fund an interdistrict plan on the basis of an intradistrict violation.

board at the beginning of the 1980-1981 school year. The estimated cost of implementing the plan for the 1980-1981 school year was just over twenty-two million dollars and the district court approved a budget in that amount. *Liddell* v. *Board of Education*, 491 F.Supp. 351, 356 (E.D. Mo. 1980).[6] The actual cost for that school year was less than budgeted—approximately nineteen million dollars. The city board contends that the state refused to pay its full one-half share of these costs. It asserts that the district court erred in failing to grant the city's board's motion to compel the state to pay the city board an additional $1,042,000.[7] *See Liddell* v. *Board of Education*, No. 72-100C(4) (July 14, 1981) (H(237)81).[8] The city board also contends that "the bulk" of the programs for which expenditures were made—and to which the state objects—"were specifically mandated by the desegregation plan, with the few remaining items being required, without dispute, by necessary implication." Accordingly, it submits that the expenditures at issue are a legitimate part of the total cost of integration and the state should be required to pay its full one-half share.

The state concedes that it forwarded a fourth-quarter payment of $894,668.50 to the city board instead of the $1,324,668 requested. It argues, however, that the specific expenditures it contests "were not included in the 1980-1981 budget approved by the [district court] * * * on May 21, 1980." It also contends that the equities of this case are in its favor because "[s]ubstantial portions of the

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[6]We affirmed the district court's decision in *Liddell II*.

[7]The $1,042,000 figure was supplied by counsel for the city board at oral argument. The district court's July 14, 1981, order (H(237)81) stated that $1,452,000 was the sum in dispute.

[8]The district court subsequently denied the city board's motion to reconsider the July 14, 1981, order and the city board's supplemental motion to compel on August 5, 1981. *Liddell* v. *Board of Education*, No. 72-100C(4) (E.D. Mo., Aug. 4, 1981) (H(294)81 and H(301)81).

programs in question were funded from in kind contributions from private and governmental sources." The state also charges that the city board's financial figures contain unexplained discrepancies and that the city board's bookkeeping evidences "sloppiness and inefficiency." In short, the state contends that the district court's rulings concerning the funding of the Year One (1980-1981) desegregation budget were well within its discretion.

The city board's reply brief correctly argues that the sole fiscal issue for Year One is to determine the numerical figure which constitutes one-half of the actual costs ($19,152,503) of the 1980-1981 desegregation plan.[9] It asserts that instead of paying its one-half share of $9,576,251, the state has paid only $8,530,000.

The district court refused to order the state to pay a larger share of the 1980-1981 budget. It stated:

> To determine proper allocation of the costs of desegregation programs, even though supported by the Danforth Foundation and other contributors, the City Board's in haec verba interpretation of Judge Meredith's order and appeals court's opinion is literally correct. In exercising its powers in equity, however, the Court is reluctant to impose such a restrictive application of funding orders.
>
> Because the expenditures for budget items captioned Other Programs have been offset by the Danforth Foundation and other contributors, the Court finds that the actual cost to the City Board of implementing the desegregation plan has been reduced by public and private contributions.

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[9] *See Liddell IV*, slip op. at 7. The state must pay one-half of the actual desegregation costs under this plan. *E.g., Liddell II*, slip op. at 28-29.

Judge Meredith's order of May 21, 1980, required the state to pay one-half of the cost of implementing and operating the city board's desegregation plan for the year 1980-1981. Our opinion of February 13, 1981, affirmed that order and emphasized that only actual costs were to be included in the total.[10] Both this Court and the district court were aware of the fact that the federal government would pay a portion of the total costs and that such payments would serve to reduce the city school board's share of the total and not the state's share. Neither Judge Meredith nor this Court considered or discussed the possibility that others, including individuals, corporations, associations or foundations, would make contributions in kind of cash toward the costs of implementing or operating the desegregation plan. In logic, had this Court considered this possibility, it would have deemed such contributions to be comparable to the federal grants and would have directed that such contributions serve to reduce the city school board's, rather than the state's, share of the desegregation costs. But we did not consider that possibility. We are, therefore, reluctant to hold that the district court abused its discretion in giving the state the credit that it did in determining what constituted the state's one-half share for the first budget year, particularly since specific budget items are disputed.

Lest there be any misunderstanding, however, we make it clear that for budget Year Two (1981-1982) and succeeding budget years, the state is required to pay one-half of the *total actual costs* of implementing and operating the desegregation plan. The state's share shall not be reduced by grants or contributions received by the city board from other public or private agencies, individuals, associations or corporations to the extent that such grants or contributions are used to defer actual costs which have been ap-

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[10] *Liddell II*, slip op. at 29.

proved by the district court in the budgetary process or thereafter. The district court, of course, retains discretion to determine which actual costs are reasonably necessary for the implementation or operation of the plan to desegregate the city schools.

One further point should be made. The district court and this Court are ill-equipped to determine what the fair, reasonable and actual desegregation costs are. The state and the city board, on the other hand, have experts who regularly and routinely work on such matters. They should be involved in the budget-making process at an early date so that disputes can be resolved on a cooperative, rather than an adversary, basis.

The federal government, the state and the city school board all face a period of budgetary restraints. It will require maximum cooperation among them, as well as continued private contributions, if the constitutional rights of the black children of St. Louis are to be fully protected. We trust that such maximum cooperation will be forthcoming from the parties to this litigation. We commend those in the private sector who have given and will give of their time, money and resources to this most important endeavor.

(2) *Vocational Education.*

(a) *Background.*

On May 21, 1980, the district court made the following finding of fact:

> The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound or administratively efficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in

> the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated.

Liddell v. *Board of Education, supra,* 491 F.Supp. at 358. In a separate provision of its May 21, 1980, decision, paragraph 12(b), the district court ordered the state defendants and the St. Louis City Board of Education

> [t]o develop and submit to the Court * * * a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in 1981-82 school year.

Id. at 353.

On February 13, 1981, this Court affirmed both the district court's factual finding and its paragraph 12(b) order. *See Liddell II,* slip op. at 19, where we held:

> Section (b) of paragraph 12 is also consistent with the district court's responsibility to order a remedy for existing constitutional violations. The district court specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was "part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." 491 F.Supp. at 358. Section (b), therefore, was designed to remedy a violation of the State of Missouri. Moreover, the Special District has now been joined as a party defendant in this lawsuit.[11] We see no reason

[11]The Special School District of St. Louis County (SSD) was joined as a party defendant on September 12, 1980. *See, e.g., Liddell* v. *Board of Education,* No. 72-100C(4), at 2 (E.D. Mo. June 11, 1981) (H(181) 81).

to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year.

Counsel for the state conceded at oral argument that the district court expressly found that the state committed an interdistrict constitutional violation by failing to merge the segregated city-county vocational programs. Although the state disagrees with that district court finding, we adhere to our February 13, 1981, affirmance of that finding and our approval of paragraph 12(b).[12]

Pursuant to the rulings by the district court and this Court, the St. Louis City Board of Education, the state defendants and the Special School District of St. Louis County (SSD) submitted proposed plans to remedy the segregated vocational education programs in the city and SSD. *Liddell* v. *Board of Education,* No. 72-100C(4), at 3 (E.D. Mo., June 11, 1981) (order designated as H(181)81). The district court's June 11, 1981, order (H(181)81) provides the following progression of events. On March 4, 1981, the district court set a hearing to begin on May 11, 1981, to consider the vocational education issues and establish pretrial procedures. The court subsequently specified an agenda and delineated the issue and evidence presentation schedule to be followed at the May 11, 1981, hearing. On May 8, 1981, the SSD filed another vocational education proposal which prompted extensive negotiations among the parties. The negotiations resulted in "a proposed consent decree supported by a majority of

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[12]We also note parenthetically that in September of 1978, the Office of Civil Rights (OCR) of the United States Department of Health, Education and Welfare found that the state's department of elementary and secondary education failed to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, with respect to the St. Louis metropolitan area vocational education programs. The OCR found, inter alia, that establishment of separate city—county vocational service areas did not comply with certain Title VI regulations.

the parties and also a [proposed vocational education] plan agreed to by all the parties except the intervening * * * Adams group plaintiffs." Along with a proposed funding order, these documents were submitted to the district court on May 20, 1981.[13]

The district court convened the vocational education hearing on May 11, 1981. At that time, the parties advised the district court that a settlement on the paragraph 12(b) vocational issues was "embarrassingly close." At the parties' request, the district court deferred holding the 12(b) hearing and as the settlement negotiations continued, the district court continued the 12(b) hearing on a day-to-day basis. The negotiations culminated in a written proposal and, on May 20, 1981, the parties submitted not only their consent decree, but also a proposed vocational education plan and funding order to the district court.

On the following day, a hearing was conducted during which the district court admitted, without objection, certain stipulations of fact and various exhibits offered by the United States. After all parties were allowed an opportunity to be heard, the district court issued a separate funding order and made the proposed consent decree and 12(b) plan part of the record.[14]

On May 27, 1981, the parties were notified that a hearing on the proposed paragraph 12(b) consent decree would begin on June 9, 1981. A notice to the Liddell class mem-

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[13]More specifically, the proposals were submitted by the state, SSD, United States, NAACP–Caldwell plaintiffs and City of St. Louis. The district court signed the consent decree on May 21, 1981. *Liddell* v. *Board of Education*, No. 72-100C(4) (E.D. Mo. May 21, 1981) (order designated as H(132)81).

[14]The funding order was independently drafted by the district court and was not a part of the parties' other agreements and submissions. The funding aspects of the vocational education programs are separately discussed in part (2)(c), *infra*.

bers was issued on that same day and the district court granted leave to interested individuals to request permission to appear in support of or in opposition to the proposed decree or to file written memoranda stating their views.[15] The Adams group filed written objections to the 12(b) consent decree, the Liddell group orally expressed opposition to the consent decree, three letters from the public were received by the district court and the University City School District filed a memorandum commenting upon the parties' 12(b) proposal. The SSD and United States filed memoranda in support of the consent decree on June 2 and June 8, 1981, respectively.[16]

The district court summarized the submitting parties' positions thus:

> The parties have, in numerous filings with this Court, the Court of Appeals, and the United States Supreme Court, stated their positions as to the facts and law regarding the issues. In the proposed consent decree submitted to the Court, the parties recited that
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> > By consenting hereto no party retracts its previous positions or concedes that its respective positions are in any way erroneous. However, the parties being desirous of implementing a solution to the issues concerning paragraph 12(b) of the May 21, 1980 order without the expense of litigation, have agreed to the entry of the decree, and

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[15]Even though the district court had signed the consent decree on May 21, *see* note 13, *supra*, it continued to treat the submissions as proposed, and eventually incorporated the terms of the submissions into its own order. *See* text at 17 *infra*.

[16]*See Liddell* v. *Board of Education*, No. 72-100C(4) (E.D. Mo. 1981) (H(150)81, a three-page memorandum in support filed by the SSD; and H(166)81, a twenty-five page memorandum in support filed by the United States).

> the Court being of the opinion that the entry of this decree will effectuate federal law * * *
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> The City of St. Louis, the United States, the Caldwell plaintiffs-intervenors, and the Special School District support the consent decree without equivocation. The Board of Education of the City of St. Louis supports the decree in accordance with the funding order entered on May 21, 1981. The State has executed the consent decree and approves the vocational plan, but is critical of the funding order. The Liddell plaintiffs approve the plan, but withheld approval of the consent decree, questioning the adequacy of the jurisdictional statement in the first paragraph. The intervening plaintiffs, Adams, object to the plan and the decree.

Although the district court expressed reluctance to enter an order and judgment as a "consent decree" because the Adams group objected to the parties' 12(b) agreement, it expressly adopted the vocational education plan, which had been agreed to by seven of the eight parties, "as its [the district court's] plan to desegregate the vocational schools in the City of St. Louis and St. Louis County." The court simply appended the parties' 12(b) plan, in its entirety, to its June 11, 1981, order and specifically made the plan a part of that order. The district court also held that the parties' vocational education plan was fair, reasonable and adequate under all the circumstances and that it satisfied constitutional standards. It "adopt[ed] the [parties' vocational education] plan as its own" and ordered the SSD, the St. Louis City Board of Education and the State of Missouri to implement the plan. The district court's June 11, 1981, order to which the parties' vocational education plan was attached also contains various other provisions, but only those directly relevant will be subsequently discussed.

(b) *Challenges to District Court's Vocational Education Orders.*

We previously held that the Adams group may challenge the 12(b) plan adopted by the district court because that group never endorsed the underlying consent decree and consistently preserved their objections to the parties' 12(b) plan. *Liddell IV,* slip op. at 5-6. We also allowed the state to "argue whether the financial obligations imposed upon it with respect to the vocational education plan are inconsistent with our previous mandates." *Id.* at 6. We dismissed the attempts by the state and SSD to escape their endorsement of the underlying consent decree and 12(b) plan. *Id.* at 4-6. Therefore, this part of the opinion involves two major issues: (1) the validity and constitutional sufficiency, on the merits, of the parties' consent decree and 12(b) plan which was adopted by the district court, and (12) the correctness of the district court's 12(b) funding orders.

We have carefully reviewed the May 21, 1981, consent decree drafted by the parties, compared it with the district court's June 11, 1981, order and conclude that the latter order adopted the consent decree without significant modification. The June 11, 1981, order tracked the consent decree's format throughout, but also: (1) added certain quotations from previous court opinions; (2) fleshed out and updated the procedural history culminating in the consent decree and 12(b) plan; (3) discussed the general legal principles applicable to consent decrees; (4) held that the 12(b) plan was fair, reasonable, adequate and constitutionally sufficient; (5) ordered the SSD, city board and state to file an interim progress report by July 15, 1983; and (6) added various funding provisions. These changes and additions, along with several nonsubstantive editorial changes made by the district court, simply were not significant. Therefore, the parties which consented to

the entry of judgment via their endorsement of the consent decree have "no status to appeal." *Stanford* v. *Utley*, 341 F.2d 265, 271 (8th Cir. 1965). *See also Liddell IV*, slip op. at 5-6 (and citations therein).

Having so concluded, we turn to the Adams group's substantive challenges to the merits of the 12(b) plan.[17] Basically, the Adams group contends that implementation of the 12(b) plan will not desegregate the predominantly black city vocational schools and the predominantly white SSD. They argue that rather than being concrete, the 12(b) plan is merely "a letter of intent to try to work out details at a later date." The Adams group asserts that the Metropolitan Coordinating Committee (MCC), which, under the 12(b) plan, would be created and given primary responsibility for enforcing the plan's desegregation requirements, would be actually answerable to no one and be a "toothless tiger" without any real power to effectuate constitutionally required desegregation of the metropolitan area vocational programs.

The Adams group cites numerical statistics which purportedly reveal that "white families who are desirous of obtaining vocational education for their children [would be encouraged] to move out of the City into the suburbs." They contend that the plan's natural result will be to resegregate the St. Louis metropolitan area and that fewer students will have the opportunity to obtain vocational training than are currently enrolled in such programs. Finally, the Adams group argues that the plans' contemplated yearly desegregation goals for vocational educational programs[18] will be impossible to achieve.

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[17]Various parties argue that the Adams group lacks standing to challenge the 12(b) plan. In light of the group's 1977 intervention and consistent participation in all phases of this litigation to date, we cannot agree.

[18]The 12(b) plan establishes the following specific racial distribution goals: *Year One* (1981-1982)—85% white and 15% black in Special

(Continued on next page)

As an alternative, the Adams group urges us to adopt a 12(b) plan which would simply merge both vocational systems by ordering the state to dedesignate the city board as the "area vocational school" (AVS) for the city and to designate the SSD as the AVS both for city and county.[19] It is argued that a single vocational system under one

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Footnote continued

District Technical Schools. *Year Two* (1982-1983)—(1) 82% white and 18% black in Special District Technical Schools; (2) initiate unduplicated programs at the city's O'Fallon Technical High School with a goal of 65% white and 35% black, but allowing a ten percentage point differential either way; (3) open the new West County Technical School and initiate unduplicated programs with racial goals of 65% white and 35% black, but allowing a ten percentage point differential either way; and (4) 10-15% white and 85-90% black at O'Fallon. *Year Three* (1983-1984)—(1) 78% white and 22% black in Special District Technical schools; (2) 50% white and 50% black at O'Fallon; (3) initiate three additional unduplicated programs with goals of 65% white and 35% black, but allowing a ten percentage point differential either way; and (4) 50% white and 50% black in O'Fallon's new tenth grade Occupational Orientation magnet program for city students. *Year Four* (1984-1985)—(1) 75% white and 25% black in Special District Technical schools; and (2) 65% white and 35% black at O'Fallon. *Year Five* (1985-1986)—The 12(b) plan's ultimate goal is to have a racial balance of 65% white and 35% black (allowing a ten percentage point differential either way) at each of the four technical schools in existence then—North County Technical, South County Technical, West County Technical and O'Fallon Technical. The plan also provides that it is certainly permissible to attain the ultimate 65%/35% goal earlier than is contemplated in the initial five-year period.

Other provisions of the plan, such as the establishment of at least seven community-based vocational programs by Year Four (1984-1985) do not have specific racial distribution goals.

[19]The term "area vocational school" (AVS) is a term of art because the Missouri State Board of Education is authorized to "designate" area vocational schools. Such designation makes the AVS eligible for significant additional financial support to serve vocational needs. Vocational education training in Missouri is delivered at comprehensive high schools, junior colleges and area vocational schools; an AVS is defined as that part of a school district which has been designated by the State Board of Education to provide vocational education for its students and students from other specified school districts.

vocational district could best desegregate the vocational programs currently being separately operated by the SSD and city board.[20] We note that in so arguing, Adams ignores the fact that a complete merger of the SSD and city board's vocational systems could be ordered under the express terms of the 12(b) plan if the plan fails to effectively desegregate the metropolitan vocational technical schools by the end of the 1985-1986 school year.[21]

We do not find the Adams group's objections persuasive. First, we do not accept the contention that the 12(b) plan is an agreement to do nothing. The plan mandates a specific yearly progression of events which will result in a racial balance of sixty-five percent white and thirty-five percent black[22] at each of the vocational technical schools which will be operating by the 1985-1986 school year. These goals and the various provisions of the 12(b) plan satisfy constitutional standards. The MCC will have extensive responsibilities and authority in ensuring that the plan is implemented and its goals reached. For example, the MCC has the power to eliminate duplication of programs and may assign students to particular vocational technical schools.

Second, the district court's June 11, 1981, order and 12(b) plan contain various reporting and monitoring pro-

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[20]The Adams group also argues that costs and attorneys' fees should be assessed against the parties which submitted the 12(b) plan adopted by the district court. We reject this contention.

[21]In addition, these considerations are distinct from a more fundamental reality: the broad remedial authority vested in the federal courts under the Supremacy Clause to eliminate proven constitutional violations committed by the state.

[22]The plan expressly allows for a ten-point percentage differential either way. While some flexibility is necessary in such planning, the 65% white/35% black goal is a realistic one and should be attained. *See also* n.18, *supra*, for a full description of the 12(b) plan's racial distribution goals.

visions. These provisions ensure that the anticipated progress will be made. In addition, the district court expressly retained jurisdiction over the vocational education issues and may take appropriate action at any time sua sponte or upon a motion of any party if implementation of the 12(b) plan does not bring about the anticipated results. Also, and as briefly noted earlier, paragraph sixteen of the 12(b) plan states that the district court, after the 1985-1986 school year and upon a party's motion after a hearing, "may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify this plan, or adopt any other plan * * *."

Third, the parties having responsibilities under the 12(b) plan must exercise those responsibilities with the utmost good faith. The parties' negotiations which resulted in the consent decree and 12(b) plan are commendable. We trust that actual desegregation of the vocational education programs in the metropolitan area will be achieved with the same cooperative spirit.

(c) *The District Court's Paragraph 12(b) Funding Orders.*

In our December 2, 1981, order, we allowed the state to "argue whether the financial obligations imposed upon it with respect to the vocational education plan are inconsistent with our previous mandates." *Liddell IV*, slip op. at 6. The district court's finding that the state was constitutionally culpable for failing to disestablish the dual vocational education systems in the city and county[23] was affirmed by this Court and the United States Supreme Court denied the state's petition for writ of certiorari.[24] Under the law of the case doctrine, this finding of culpa-

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[23] *Liddell* v. *Board of Education*, 491 F.Supp. 351, 358 (E.D. Mo. 1980).

[24] *Liddell II*, slip op. at 19. *See* n.1, *supra*.

bility must be followed in all subsequent district and appellate proceedings. *See, e.g., Continental Bank & Trust Co.* v. *American Bonding,* 630 F.2d 606, 608 (8th Cir. 1980); *Houghton* v. *McDonnell Douglas Corp.,* 627 F.2d 858, 864 (8th Cir. 1980).

The district court's June 11, 1981, order provided that funds to meet the commitments of the state defendants to the 12(b) approved plan shall be made available by the state defendants.[25] The court expressly recognized that significant start-up costs, outlays for building renovation and additional operating expenses would be necessary to establish vocational programs in ninth and tenth grades at regular comprehensive city high schools.[26] It noted that there were unspent funds earmarked for the 1980-1981 St. Louis Desegregation Budget which had been provided

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[25]The district court actually considered vocational funding issues on four separate occasions. First, the district court signed a consent decree on May 21, 1981. H(132)81 (described *supra* at 16-17). Paragraph 6 of the decree provided that "[f]unds to meet the commitments of the State Defendants to the [12(b)] plan * * * shall be made available by the State Defendants and the Missouri General Assembly subject to and in compliance with any applicable provisions of law." Because the parties were unable to agree on how the plan would be funded, the district court entered a separate funding order on May 21, 1981. H(134)81. This second attempt to address funding issues was independently drafted by the district court and contained funding provisions that were substantially incorporated in the district court's third order, dated June 11, 1981. The district court entered the final vocational funding order that is relevant to our consideration on June 24, 1981, in response to the state defendants' motion to reconsider the previous funding orders. *See* text accompanying notes 29 & 30, *infra.*

[26]Under the parties' 12(b) plan, the vocational technical schools will offer vocational training only for grades eleven and twelve. As a result, vocational training presently offered for grades nine and ten at O'Fallon Technical High School would be eliminated and vocational programs for those grades would be merged into "comprehensive" high schools in the City of St. Louis. "Comprehensive" high schools are regular curriculum high schools not designated or operating specially as "vocational schools."

by the state and by the federal government via the Emergency School Assistance Act (ESAA). Like its May 21, 1981, order, the court directed that one million dollars of the unspent state funds designated for St. Louis desegregation be placed in a separate account to be used for vocational education expenses. It again directed the city board to promptly apply to the United States Department of Education for permission to use previously designated ESAA funds to "fund costs for the development, equipment, renovation and operational costs for the City Board's vocational programs." The June 11, 1980, order also contained the following specific funding provisions:

> D. The Board of Education of the City of St. Louis shall reimburse the State [the one million dollars of state funds discussed above] * * *, spent to the extent that monies are available at the end of the 1981-82 school year from the City Board's Debt Retirement Fund which are not otherwise restricted by prior Court order or necessary for the retirement of the City Board's debt. If the City Board has no such funds, the State shall continue to pay such costs from the [one million dollar account previously discussed] * * *.
>
> E. If the above funds are still insufficient to develop, equip, renovate and cover increases in operational costs for these programs which result from compliance with the plan and this decree, then the remainder of the unspent State designated monies existing in the 1980-81 desegregation Budget shall be utilized as necessary.

11. [sic] During the phase out of ninth and tenth grade students from O'Fallon Technical High School to comprehensive high schools in the City of St. Louis,

the State funding allocated for such programs during the school year of phase out shall be paid to the Board of Education of the City of St. Louis for vocational education related matters. Said funding to the City Board shall continue each year thereafter.[27]

12. The Court recognizes that the Special School District has previously budgeted two million dollars ($2,000,000.00) [in new equipment] for equipping West County Technical High School which will open in Year Two of the 12b plan for consolidated vocational programs. Much of this equipment will be used at the discretion of the Metropolitan Coordinating Committee for unduplicated programs under the consolidated program plan. [28]

13. All costs concerning the implementation of the vocational programs shall be subject to review by this Court if any party disputes any of these costs as not being reasonable or necessary for the implementation of this order.

14. In the event that the Board of Education of the City of St. Louis is unable to fund the development, equipment, and/or renovation costs and to cover increases in operational costs for these programs which result from compliance with the plan and this decree from the above sources or with current desegregation budgeted revenues, the Board of Education of the City

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[27]The final sentence of paragraph 11 initially stated: "State defendants have agreed to this provision." On June 24, 1981, the district court deleted this sentence and added the following phrase: "• • • • under the desegregation order or modifications thereof." *Liddell* v. *Board of Education*, No. 72-100C(4), slip op. at 3 (June 24, 1981) (H(207)81).

[28]The phrase "in new equipment" bracketed in the quotation above was added by the district court on June 24, 1981. *Liddell* v. *Board of Education*, No. 72-100C(4), slip op. at 4 (June 24, 1981) (H(207)81).

> of St. Louis shall apply to the Court for such appropriate orders as may be necessary to secure additional funds essential for such purposes.

The district court also retained jurisdiction of the 12(b) aspects should further vocational-related orders—funding or otherwise—become necessary.

Finally, on June 24, 1981,[29] following a hearing held on June 23, 1981, the district court partially revised its June 11 order in response to the state defendant's motion to "reconsider * * * [the district court's] funding order dated May 21, 1981." In the fourth order, the court considered the state defendant's objections to the May 21, 1981, order, harmonized the May 21, 1981, funding provisions with those in the June 11, 1981, order and made certain minor modifications to its June 11, 1981, funding provisions.[30]

After careful review of these four 12(b) vocational education funding orders, we hold that the district court did not abuse its discretion in entering the funding provisions of the various orders. This Court has previously held that the state committed an interdistrict constitutional violation by failing to dismantle the racially segregated separate vocational programs in the SSD and city school districts.[31] The state's contention that this previous determination is not an adjudication of interdistrict liability for the vocational aspects of this case is without merit. The district court may, therefore, impose 12(b) fundings orders against the state.

In affirming the district court's 12(b) funding orders,

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[29]H(207)81.

[30]*See* notes 27 & 28, *supra*.

[31]The Missouri State Board of Education simply could have designated the SSD as the AVS for the entire St. Louis metropolitan area by adding the city school district to the SSD's vocational service area.

we note that the state had ample opportunity to contest the need for and reasonableness of the contemplated vocational costs.[32] In the future, it should participate fully in the budgetary process involving the vocational programs.

(3) (a) *Joinder of Suburban Districts and County Units of Government.*

On August 24, 1981, in H(337)81, the district court added eighteen St. Louis County suburban school districts and three St. Louis County governmental officials as parties defendant to this litigation.[33] The district court also stayed various motions to add several other suburban school districts and other entities as parties defendant. Finally, the district court ordered the state defendants and city board to develop and submit a suggested plan of interdistrict school desegregation pursuant to paragraph 12(c).[34]

Several parties appealed from H(337)81 and, in response, others filed motions to dismiss those appeals for

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[32]At oral argument, counsel for the Adams group contended that the average cost of the 12(b) plan per student will be $60,000, compared to pre-plan cost of $2,800 per student. This argument ignores the fact that a portion of the city board's proposed 1981-1982 vocational budget ($1,394,840 out of a total proposed vocational budget of $2,400,147) would be spent for capital outlay. It seems apparent that many of the capital expenditures would pay for the phase out of ninth and tenth grade vocational training at O'Fallon Technical High School and the implementation of vocational training for those two grades at the city's comprehensive high schools. Obviously, many "start up" costs would require a single capital outlay which would not be required in subsequent years. In any event, the district court will consider the Adams group's per-student cost claim when it considers the city board's proposed 1981-1982 vocational budget.

[33]The Pattonville School District was added as a party defendant in H(337)81 but later agreed to participate in the paragraph 12(a) voluntary interdistrict pupil transfer plan. As a result, the district court subsequently stayed motions seeking to join Pattonville as a party defendant in the interdistrict liability proceedings.

[34]Paragraph 12(c) is fully discussed in Part (3) (b).

lack of appellate jurisdiction. On December 2, 1981, we concluded the validity and scope of paragraph 12(c) may be reargued but we expressly reserved ruling on the jurisdictional questions concerning the appeals from H(337)81. *Liddell IV*, slip op. at 7-8.

We now hold that we lack jurisdiction to entertain the appeals from H(337)81. The portions of the district court's order which added additional party defendants are not appealable. *Liddell IV* at 5 n.6 (and citation therein). The portions of H(337)81 which stayed certain proceedings pending before the district court—for example, the motions to add additional entities as party defendants—are also not appealable. *Id.* at 13 (and citation therein).

Many newly joined defendants argue that the interdistrict liability issues should be tried as an entirely separate lawsuit, claiming in part that beginning a new record is preferable to utilizing and adding to the large record already accumulated in this litigation. Similarly, the state, in arguing that the interdistrict issues should be tried separately, contends that joinder of so many more defendants to the original lawsuit will not foster judicial economy.

In contrast, the city board, which was recently aligned as a plaintiff in the interdistrict proceedings, asserts that the interdistrict liability issues would best be tried in a single lawsuit. All the plaintiffs in the interdistrict liability phase, however, claimed at oral argument that they only wanted an opportunity to prove an interdistrict case against the defendants.

We must again stress that many orders entered by the district court are nothing more than matters of case management. The district court must manage this difficult litigation on a day-to-day basis and the parties must not file "premature and piecemeal interlocutory appeals which

have no jurisdictional basis." *Liddell IV*, slip op. at 14. Although we lack jurisdiction to consider the challenges to H(337)81, we trust that part (3)(b) of this opinion will alleviate some of the recurring concern of the parties relating to interdistrict matters.

(3) (b) *The 12(c) Proceedings and Interdistrict Relief.*

Considerable controversy has arisen over the proper construction of paragraph 12(c) of Judge Meredith's order of May 21, 1980. This order was approved by this Court as originally entered[35] and as subsequently amended.[36] The amended paragraph 12(c) order reads in pertinent part as follows:

> [T]he State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of inter-district school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignments and administrative reorganization provisions.

Pursuant to this paragraph, four comprehensive plans for integrating the St. Louis schools and various sub-

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[35] *Liddell II*, slip op. at 19-20.

[36] *Liddell III*, slip op. at 13-17.

urban schools have been filed with the district court. Several appellants, especially the St. Louis County schools, governmental units and officials who have been joined as defendants, contend that the district court intends to implement these plans without first affording the suburban schools or governmental units that would be affected an opportunity to be heard and without first making findings of interdistrict liability. They base this view on a series of eight orders issued by the district court, and particularly two orders issued on September 24, 1981.[37] In those two September 24, 1981, orders, the district court used some language indicating it would "enforce a metropolitan desegregation remedy against the State and St. Louis County school districts as state instrumentalities."[38]

The state defendants contend that because all of the plans for integrating city and county schools would substantially affect the defendant county districts by consoli-

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[37]H(336)81; H(337)81; ruling on motion H(341)81; rulings on motions H(409)81 and H(410)81; H(476)81; H(493)81; and H(494)81.

The orders designated as H(493)81 and H(494)81 were issued on September 24, 1981.

[38]*We do not reach the state's recurring argument that it cannot merge independent school districts because it lacks real control over those districts. This lack of control, argues the state, supports its view that local school districts are not its "instrumentalities." In support of this argument, the state places primary reliance on England* v. *Eckley*, 330 S.W.2d 738 (Mo. 1959) (en banc); *State* v. *Holmes*, 231 S.W.2d 185 (Mo. 1950) (en banc); and Mo. Const. art. III, § 40.

Regardless of whether the state's arguments have any validity, both Judge Meredith and this Court assured the suburban school districts that they would be given an opportunity to be heard before any imposition of a mandatory interdistrict desegregation remedy. We honor those assurances. Many suburban school districts are now party defendants in this litigation and the interdistrict liability issues will be determined after a full liability hearing. The district court may, if it deems necessary, reach the state's "instrumentality" arguments in the interdistrict liability proceedings. We need not at this time address the merits of the interdistrict proposals before the district court.

dation of districts, realignment of school boundaries, or pairing of school districts, they cannot be ordered to implement such a remedy until and unless the county schools have been heard and a determination has been made that they have contributed to the segregation of city and county schools. They also argue that further hearings are required to establish whether they can be required to take any actions in addition to those they have already been required to take with respect to the city schools.

The Liddell appellants, on the other hand, assert that the State of Missouri has the ultimate and exclusive responsibility for public education in the state and that, inasmuch as it has been found to be a constitutional wrongdoer in segregating the public schools of the City of St. Louis, it can be required to realign city and county school boundaries and to require consolidation of these schools to further desegregation of both city and county schools without further hearings to determine the liability of the county school districts.

The Adams group, representing white parents and students of South St. Louis, also contend that the district court can order the State of Missouri to realign boundaries between city and county schools and to order consolidation of city and county schools if necessary to effectuate desegregation of the city schools. They, too, assert that it can take these actions without additional hearings or liability findings and cite as support *Morrilton School District* v. *United States*, 606 F.2d 222 (8th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1071 (1980); *Evans* v. *Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980); *United States* v. *Board of School Commissioners*, 573 F.2d 400 (7th Cir. 1978).

The City of St. Louis takes the position that the district court orders are not reviewable under 28 U.S.C.

§§ 1291 or 1292. It asserts that the appeals before the court in this category are "little more than invitations to this Court to issue a declaratory or advisory opinion concerning the interdistrict aspects, if any, of the case below." They urge us to reject the parties' invitation to use 28 U.S.C. § 1651 as a vehicle to control interlocutory decisions of the district court and subvert the express federal policy against piecemeal litigation.

There is a great deal of merit to the arguments advanced by the City of St. Louis. The district court has yet to issue an order that impacts any of the county schools or units of government. Thus, we are being asked not to rule on a specific plan but to anticipate what the district court may have in mind and to instruct it as to what it can or cannot do. The most that can be said is that the district court has indicated in one or more of its orders that it may take actions which impact significantly on St. Louis County school districts. While the city board is not opposed to such action as a matter of principle, it fears that either this Court or the United States Supreme Court will find that the action taken is inconsistent with the Supreme Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), and that as a result, meaningful interdistrict relief will be delayed for years.

The State of Missouri and the county defendants, on the other hand, are opposed to interdistrict relief as a matter of principle. They assert that they have not been found to have contributed to the segregation of either city or county schools and that unless and until they have been found to have done so after a hearing in which they have had an opportunity to participate, no orders requiring them to take any action with respect to integrating either city or county schools can be taken.

We have no desire to interject ourselves into the management and direction of this case by the district court.

That is not our responsibility. We have no wish to take any action which will encourage constant interlocutory appeals, and we do not intend to issue advisory opinions whenever one or more of the parties feels that the district court is about to take a step with which they disagree. We, therefore, hold that we are without jurisdiction to consider the various appeals from the district court's severance order. *See* 9 Moore's Federal Practice ¶ 110.13[8], p. 183 (1980).

In light of the fact that our earlier opinions with respect to paragraph 12(c) may have led to some confusion, we will, however, restate the position of this Court. We do so in order that the process of integrating the St. Louis city schools can continue without interruption and so that the plaintiffs below can obtain a prompt determination of their claim that an interdistrict remedy is appropriate here.

Paragraph 12(c) permitted the district court to require the defendants who have been adjudged to be constitutional wrongdoers—the state defendants and the city board—to prepare and submit feasibility plans for interdistrict desegregation involving city and surban schools in a way that will provide complete and lasting school desegregation.

Four major plans now have been submitted. Three of them are broad in scope and would, in essence, establish a single integrated school district consisting of the present city district and a number of suburban districts, the number depending on the particular plan. The new district would be divided into areas for administrative purposes, with students assigned and transported where necessary to achieve a thoroughly integrated school system. The state's plan is essentially one calling for cooperation between school districts.

It is clear from our earlier orders that the broadly

based plans cannot be implemented in the context of the present 12(c) proceedings.

It is equally clear, however, that the district court can require existing defendants—the state and the city school board—to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the voluntary participation of the suburban schools. For example, the district court could (1) require the state and the city to take additional steps to improve the quality of the remaining all-black schools in the City of St. Louis; (2) require that additional magnet schools be established at state expense within the city or in suburban school districts with the consent of the suburban districts where the schools would be located; (3) require that additional part-time programs be established at state expense to provide for more integrative experiences for students in all-black city schools, including programs which would involve voluntary participation by suburban schools; and (4) require the state to provide additional incentives for voluntary interdistrict transfer.[39] Such relief would not materially affect parties that have not been found constitutionally liable and, hence, would be permissible under paragraph 12(c).

There is thus no sound reason why the 12(c) hearings should not go forward promptly and why the district court should not determine what actions it can require the state or the city board to take which may involve the suburban schools.

The record also reveals other innovative ideas and techniques that the district court may consider. Their

[39]These possible remedies are given as examples only. They are not intended to represent an exhaustive list. The district court may adopt other remedies that are appropriate.

feasibility and cost can be explored in the evidentiary hearings which have already been scheduled and which can be completed promptly. Many of these ideas and techniques require cooperation by the suburban schools, others do not. To the extent that suburban schools are willing to cooperate, the plans requiring their participation can now go forward. To the extent that they are unwilling to do so, the 12(c) plans must be tailored to be effective without their mandated participation. We emphasize that suburban schools that voluntarily participate will not by such participation admit liability or waive any right that they presently have to be excluded from a plan of mandatory interdistrict desegregation.

In the interests of judicial economy, we suggest that the interdistrict liability proceedings previously severed from the remainder of the case be postponed until after the district court has entered an order in the pending 12(c) proceeding. The interdistrict liability aspect should then proceed promptly thereafter.

(4) *Recusal.*

On September 24, 1981,[40] Judge Hungate denied several motions by county schools and other county defendants to disqualify himself from presiding in this case. Specifically, he declined to recuse himself "as to proceedings related to the original lawsuit, including the implementation of remedial plans pursuant to paragraphs 12(a)-(d) * * *." He did, however, recuse himself "as to the claims of interdistrict constitutional violations" which were presented in various pleadings filed by leave of the district court. In making these rulings, he specifically held that the moving parties' affidavits,[41] which alleged that he had

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[40]H(494)81.

[41]The following parties filed separate motions, along with various pleadings, memoranda and affidavits, to disqualify Judge Hungate: (1)

(Continued on next page)

predetermined the interdistrict liability issues, were "clearly insufficient" to warrant recusal under 28 U.S.C. §§ 144 and 455. Nevertheless, he recused himself "from determination of the alleged constitutional violations by the county school district as individual entities" so that "disposition of this complex litigation may proceed in an atmosphere of calm reflection."

Several parties appealed from this partial recusal order and, in response, others filed motions to dismiss those appeals for lack of appellate jurisdiction. On December 2, 1931, we concluded that the various appeals from H(494)81 "arguably" feel within our appellate jurisdiction and allowed them to proceed with a specific reservation of the jurisdiction issues until after briefing and oral argument. *Liddell IV*, slip op. at 9 & 9 n.12. We now hold that we lack jurisdiction to entertain the appeals from the H(494)81 order.

A district judge's determination "*not* to disqualify himself is reviewable by appeal only from a final judgment in the cause in which the motion for disqualification was filed." *Scarrella* v. *Midwest Federal Savings and Loan*, 536 F.2d 1207, 1210 (8th Cir.) (per curiam), *cert. denied*, 429 U.S. 885 (1976) (emphasis added). Such a determination, however, is reviewable by a petition for a writ of mandamus and we may, as we choose to do so here, treat an allegation on appeal as such a petition.

We turn then to the question of whether we should

Footnote continued

St. Louis County and its individually named officials; (2) Riverview Gardens School District; (3) Mehlville School District; (4) Affton School District; (5) Maplewood-Richmond Heights School District; (6) Jennings School District; (7) Brentwood School District; (8) Bayless School District; (9) Hancock Place School District; (10) Lndbergh School District; (11) Ladue School District; (13) Rockwood School District; and (14) Webster Groves School District.

issue a writ of mandamus to require Judge Hungate to disqualify himself. In *Pfizer, Inc.* v. *Lord*, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972), we held that mandamus may be utilized to review a district judge's refusal to recuse himself. We also reviewed the standards for recusal. *Id.* at 537. *In United States* v. *Poludniak*, 657 F.2d 948 (8th Cir. 1981), we again reviewed the standards for recusal, this time in the light of 28 U.S.C. § 455(a) as amended in 1974, which provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

On the basis of a careful review of the record, we find no basis to direct Judge Hungate to recuse himself from the original proceedings. The substance of the movants' claims is that Judge Hungate decided in advance of any evidentiary hearings that the county schools and county defendants would be required to participate in a mandatory interdistrict plan for desegregating the county and city schools. They essentially base this allegation on two statements made by the judge and two orders issued by him.

On April 1, 1981, Judge Hungate stated:

> If I may, in an aside, talk about the different sections we have—12(a)'s, 12(b)'s, 12(c)'s; we have voluntary or mandatory:
>
> In World War II, WWII, the big one, you could volunteer. Some of us had that opportunity. You could volunteer to go to the Air Force. If you volunteered, they would put you there. You could volunteer for the National Guard. You could volunteer for the Navy. Some of us didn't do that. Later we were drafted, and we were placed in the infantry. You'd be surprised at what great interest the sergeant would have in what

you would then like to volunteer for. Now the reception was not too good at that time. I hope that's helpful.

On May 20, 1981, he reportedly stated in substance:

> We all have bosses and the Eighth Circuit is mine. I have to do what they say and if enough people do not participate with [sic, in] the voluntary plan, I will have to enter a mandatory plan.

On August 24, 1981, Judge Hungate issued an order (H(337)81) which read in part as follows:

> In light of the overwhelming rejection of the 12(a) voluntary plan, the Court is compelled to begin proceedings on a mandatory inter-district plan pursuant to paragraph 12(c) * * *, On February 13, 1981, the United States Court of Appeals for the Eighth Circuit affirmed this Court's power to order a mandatory inter-district remedy.
>
> * * * *
>
> [T]he State defendants * * * and the St. Louis Board of Education are ordered and directed as follows:
>
> To develop and submit to the Court by February 1, 1982, a suggested plan of interdistrict desegregation necessary to *eradicate the remaining vestiges of government-imposed school segregation in the City of St. Louis and St. Louis County.* [Emphasis added.]

On August 25, 1981, he issued another order (H(340)81) which directed the court-appointed experts:

> To provide expert assistance to this Court in developing *and implementing* a mandatory, interdistrict desegregation remedy pursuant to paragraph 12(c) of Judge Meredith's order dated May 21, 1980, as amended, and as affirmed by the United States Court of Appeals for the Eighth Circuit. [Emphasis added.]

He further ordered as follows:

> IT IS HEREBY ORDERED that the educational experts appointed by the Court on August 1, 1981, H(285)81, be and they are directed to begin assembling data necessary for devising *a mandatory interdistrict remedy pursuant to paragraph 12(c) for presentation to the parties for implementation in the 1982-83 school year.* IT IS HEREBY FURTHER ORDERED that on or before September 7, 1981, the experts shall file a proposed timetable for outlining the broad parameters of a 12(c) mandatory interdistrict plan. The framework shall be submitted to the Court before the expiration of their 90-day appointment, November 16, 1981. [Emphasis added.]

Certainly the orders cannot serve as a basis for recusal. Judge Hungate was complying with paragraph 12(c) of Judge Meredith's order which has been approved by this Court. The Supreme Court declined to review our decision approving paragraph 12(c). Even if it is assumed that Judge Hungate was reading more into 12(c) than either Judge Meredith or this Court intended, such a reading does not indicate any prejudice on Judge Hungate's part and is not grounds for recusal.

Nor can the oral statements made during the course of the 12(a) proceedings serve as a basis for recusal. At most, they indicate a view on his part that if a successful voluntary plan could not be put together, he would be required to enter a mandatory plan at some date in the future: whether before or after an evidentiary hearing for the affected suburban schools is not clear. In sum, the orders and statements do not indicate any personal prejudice on his part but, instead, are simply an expression of what he considered his duty to be. *See, e.g., Cleveland* v. *Krupansky*, 619 F.2d 576, 578-579 (6th Cir.) (per curiam),

cert. denied, 449 U.S. 834 (1980); *In re International Business Machines Corp.*, 618 F.2d 923, 927-932 (2nd Cir. 1980); *Davis* v. *Board of School Commissioners*, 517 F.2d 1044, 1049-1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States* v. *Anderson*, 433 F.2d 856, 860 (8th Cir. 1970). For all these reasons, we decline to issue a writ of mandamus to overrule Judge Hungate's refusal to disqualify himself from the original proceedings.

In addition, we hold that we lack jurisdiction to entertain challenges to that portion of H(494)81 in which the district judge recused himself as to the interdistrict liability issues of the case.[42] *See Hampton* v. *Chicago*, 643 F.2d 478 (7th Cir. 1981) (per curiam) (a district court's order granting a motion to recuse is neither appealable nor subject to mandamus review because a litigant does not have a cognizable interest in having a particular judge sit in his case).

This is a very difficult case and emotions run high. The issues involved here, unfortunately, have been politicized by some public officials and candidates for public office. Every determination entered by the presiding judge has been, and will continue to be, seized upon by someone to advance his own interests. Thus, prudence, caution and fairness is necessary. We are confident that Judge Hungate has these qualities and that his only aim is to see that the constitutional rights of those affected are vindicated. Chief Judge Wangelin may, if he chooses to do so, reappoint Judge Hungate to preside in the interdistrict liability phase if Judge Hungate would be willing to reassume exclusive control over this complicated case.

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[42] As noted more specifically above, the district judge recused himself from considering the interdistrict liability issues concerning the county suburban school districts. The recusal order presumably is equally applicable to the potential interdistrict liability of the original defendants and the other newly added defendants in this litigation.

CONCLUSION

We once again remand this cause to the district court for further proceedings consistent with this opinion.

The Special School District of St. Louis County and the State of Missouri shall equally bear all costs relating to the appeals which raised issues relating to vocational education. With this exception, each party to these appeals shall bear its own costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al., *Defendants.*	No. 72-100-C (C)

ORDER

The Court held two meetings with all counsel, on September 12, 1980 and on September 17, 1980, to discuss the questions raised about the interpretation of paragraph 12 of the Order of May 21, 1980, and certain problems which have arisen in connection therewith. It appears to the Court that it is highly important that the efforts of the United States, the State, and he St. Louis Board of Education, heretofore developed with the cooperation of county school districts should be continued and intensified. This and other considerations indicate the advisability of changing timetables and certain aspects of the parties' participation in some of the programs which are the subject of subparagraphs (a) through (d) of paragraph 12.

IT IS THEREFORE ORDERED that:

1. (a) Paragraph 12(a) is hereby amended by changing the date of July 1, 1980 to December 15, 1980, and adding thereafter the following: The State defendants, the

United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

(b) One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts, shall be the study of the feasibility of establishing magnet schools located in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

2. The filing date of November 1, 1980 provided for in paragraph 12(b) of the said Order for a plan to consolidate or merge and full desegregation of the vocational programs is hereby extended to December 15, 1980.

3. Paragraph 12(c) is hereby amended as to the fol-

lowing provisions: On or before February 16, 1981 the State defendants and the St. Louis Board of Education shall prepare and submit to the Court a feasibility plan of interdistrict school desegregation involving the St. Louis school district and such suburban school districts, that will provide complete and lasting school desegregation. These considerations may apply to those suburban school districts which are not necessarily confined to the suburban districts located in St. Louis County but limited only by considerations of feasibility and practicality, including reasonableness of transportation times and distances. This feasibility plan should include educational and ancillary components such as those outlined in the Court of Appeals' opinion of March 3, 1980 in this case, and should specifically include pupil assignment and administrative reorganization provisions.

4. The filing date of November 1, 1980 provided for in paragraph 12(d) of the said Order for a suggested plan to insure that the operation of federally assisted housing programs in the St. Louis metropolitan area will facilitate the St. Louis school desegregation is hereby extended to November 17, 1980.

5. Dr. Gary Orfield and Edward T. Foote shall continue their work of coordination and assistance to the parties, particularly those having direct responsibility under any of the foregoing paragraphs. It is expected that Dr. Orfield will be available to assist the State defendants who will take the leading role in developing the feasibility plan under paragraph 12(c) as amended herein. Dr. Orfield is authorized, upon notice to the Court and the parties, to engage such additional experts and develop such additional information as he deems necessary in the performance of his court-designated duties. Dr. Orfield shall submit to the Court on November 17, 1980 an interim status report on the progress that is being made by the

parties in the development of their respective reports to the Court. Dr. Orfield shall submit a final, substantive report three weeks after the date on which the three parties referred to submit the plans and reports required of them.

DATED this 17th day of September, 1980.

James H. Meredith
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, et al., *Defendants.*	No. 72-100-C (C)

ORDER

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that:

1. Pursuant to paragraph 12(a) of the Court's Order of May 21, 1980 (as amended September 17, 1980), the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981. The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

2. The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis

County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in the City of St. Louis, including the race and grade of those students.

DATED this 19th day of December, 1980.

J. H. Meredith
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, Missouri, et al.,
Defendants.

No. 72-100-C (C)

MEMORANDUM

On December 15, 1980, the State of Missouri submitted a plan pursuant to paragraph 12(a) of the Court's Order of May 21, 1980. The Court has examined the plan as well as the joint report filed by the United States and the Board of Education of the City of St. Louis.

This Court is well aware of the problems encountered by the Board of Education of the State of Missouri attempting to obtain the voluntary cooperation of the County school districts in a plan which would assist in the desegregation of the City schools. The Court is also aware that the State of Missouri has appealed the orders of this Court; arguments on these matters have been heard by the United States Court of Appeals for the Eighth Circuit. However, the fact remains that the Court of Appeals for the Eighth Circuit has found that the State of Missouri as a matter of law has a duty to eliminate segregation in the schools of this State. That Court also suggested to this Court that an effort be made to work out a voluntary plan of integra-

tion wtihin the County school districts. *See Adams* v. *United States,* 620 F.2d 1277, 1296 (8th Cir. 1980).

It is the opinion of this Court that the plan submitted by the State of Missouri is insufficient for this Court to make a determination as to whether or not it is feasible to pursue further the voluntary avenues of integration with the County schools. Various parties of this suit have indicated that it is their intention to add as parties to this suit a number of the districts in St. Louis County as well as the school districts in Jefferson and St. Charles Counties in a voluntary plan cannot be formulated. In one last effort to promote a voluntary plan, this Court will order the State of Missouri, and particularly the Board of Education for the State of Missouri and the Commissioner of Education for the State of Missouri, to submit another voluntary and cooperative plan on or before February 2, 1981. This plan shall contain the following:

1. The number of students that each district in the County can accommodate caused by the decrease in the number of students between the school years 1979-80 and the beginning of school year 1980-81.

2. Specific details for each district on the number of teachers, available space, and the desirability of its location for students from either the City of St. Louis or other districts within the County.

3. The present racial mixture of each school district in St. Louis County.

4. A plan providing for the interchange of students between the districts of the County in order to achieve more integration, and between the County and the City.

5. Specific recommendations for locations of magnet schools and the manner in which they may be implemented both on a part-time and a full-time basis for students within the County and from the City.

6. Specific financial estimates of costs and the means whereby the plan may be financed. The burden of financing will be borne primarily by the State of Missouri and shall discuss the possibilities of:

a. New legislation;

b. A fiscal incentive bill so that the districts participating will enhance their situation by participating;

c. Money to be taken from surplus of the State and given to the State Board of Education to pay the cost of transportation and additional expenses involved; and

d. Remuneration from the federal government on such plans.

7. Specifics as to the types and locations of magnet schools within the County. The plan should be specific on how the locations have been chosen. Locations shall be chosen in a fashion that would allow students from Jefferson County and St. Charles County to participate in the magnet schools if they desire.

The State of Missouri has a strong, effective Department of Education. It has a great deal of expertise and experience and should experience little difficulty in drawing and implementing a plan of voluntary and cooperative integration which is educationally sound and comprehensive. The Court will be looking forward to its comprensive report to be filed on February 2, 1981. This report shall assume that each district in the County will participate in the voluntary and cooperative plan. The plan shall encompass every district in St. Louis County.

When the plan is filed on February 2, 1981, it shall also be sent to all parties of this litigation and to every district in St. Louis County as well as St. Charles and Jefferson Counties.

The Department of Education of the State of Missouri shall then contact each district in the County and report back to the Court on March 2, 1981. Included in its report shall be a list of those districts in St. Louis, Jefferson and St. Charles Counties that are willing to participate and the manner in which they are willing to participate. Included also shall be a breakdown for each district of the number of students the district is willing to receive and the number of students the district is willing to send to other districts, including the race and grade of those students participating. The Department of Education shall also report on those districts which refuse to participate in the plan.

DATED this 19 day of December, 1980.

J. H. Meredith
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	No. 72-100C(4)

ORDER

This matter is before the Court on the Board of Education's motion filed on January 27, 1981, to stay discovery proceedings.

Parties to this nine-year-old suit have continually delayed meeting obligations to remedy the effects of unconstitutional segregation. This Court has been directed by the Eighth Circuit Court of Appeals to "countenance no excuse for further delay." *Liddell* v. *Board of Education of the City of St. Louis,* No. 80-1458, slip op. at 20 n.6 (8th Cir., Feb. 13, 1981). To this end, the Court denied, on February 26, 1981, State defendants' motion to stay Judge Meredith's order of December 19, 1980. The orders of this Court must be complied with or action will be taken against the parties as herein detailed.

For the reasons stated below, the Board's motion to stay discovery is granted for a period of sixty days fol-

lowing the date of this order, except insofar as discovery relates to the Special School District. In addition, the State defendants, in conjunction with the City Board of Education and the United States, shall comply with Judge Meredith's order dated December 19, 1980, within sixty days of the date of this order, with an interim progress report to be filed within thirty days.

I. *Background.*

Prior to the Supreme Court holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), the State of Missouri required segregation in schools by law. The State Constitution provided that:

> Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law. Mo. Const. art. IX, § 1(a)(1945).

Several state statutes similarly required segregation in public schools. *See, e.g.*, Act of February 6, 1847, § 1, 1847 Mo. Laws 103; Act of February 17, 1865, § 13, 1865 Mo. Laws 170; Act of June 11, 1889, § 7051a, 1889 Mo. Laws 226. For example, one statute in effect at the time *Brown* was decided provided that

> Separate free schools shall be established for the education of children of African descent; and it shall herein be unlawful for any colored child to attend any white school, or for any white child to attend a colored school. Mo. Rev. Stat. § 163.130 (1939).

Until 1954, any school board in the State of Missouri attempting desegregation would have found itself in violation of the Constitution and statutes of the State of Missouri.

In these circumstances, the State of Missouri stands before this Court in a different light than do other parties in this case.

Eighth Circuit Court of Appeals Mandate: March 3, 1980

On March 3, 1980, the Eighth Circuit Court of Appeals found that the Board of Education of the City of St. Louis had failed to integrate the "state-mandated segregated [school] system" as required by the Supreme Court's mandates of *Brown* v. *Board of Education, supra;* 349 U.S. 294 (1955). *Adams* v. *United States, supra* at 1280. The Court of Appeals directed the district court to require "the Board of Education, in conjunction with the parties . . . to develop and implement a plan that will integrate the St. Louis public schools." *Id.*

District Court Orders

On May 21, 1980, Judge Meredith ordered State defendants, the United States and the City Board of Education [hereinafter "Polities"]:

> 12(a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the court for approval by July 1, 1980.

The Court hereby reaffirms Judge Meredith's Order in directing the City Board and the United States to cooperate in the preparation of such a plan.

Delay of Compliance with Court Orders

The questions here presented are not new to this Court. State defendants have repeatedly made application to this and other courts in an effort to delay compliance with Judge Meredith's orders.

It is clearly established that unconstitutional segregation of public schools must be remedied "with all deliberate speed." *Brown v. Board of Education, supra,* 349 U.S. at 201. *See, e.g., Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now.*"); *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 234 (1963) ("The time for mere 'deliberate speed' has run out . . . .").

Notwithstanding a clear constitutional obligation, the following chronological review illustrates defendants' continual delay and failure to comply.

A. *June 17, 1980:* State defendants appealed Judge Meredith's Order to the Eighth Circuit Court of Appeals. On August 15, 1980, the Appeals Court denied the request for a stay.

B. *June 20, 1980:* Judge Meredith extended the deadline for filing a 12(a) plan until July 14, 1980.

July 14, 1980: Defendants submitted an Interim Joint Report and Judge Meredith granted defendants an extension until August 22, 1980, in which to file a final report.

August 22, 1980: Defendants submitted a Second Interim Joint Report.

C. *September 2, 1980:* Mr. Justice Blackmun denied the State defendants' request for a stay of Judge Meredith's May 21, 1980, ruling.

September 9, 1980: Mr. Justice Rehnquist denied the same request.

D. *September 17, 1980:* Judge Meredith amended paragraph 12(a) of the order dated May 21, 1980, by changing the date of July 1, 1980 to December 15, 1980 . . ."

Insufficiency of Compliance

On December 15, 1980, State defendants filed a plan pursuant to the Court's May 21, 1980, order, as amended. On the same date, the City Board of Education and the United States filed a Joint Report Under Paragraph 12(a) of the Court's Order of May 21, as amended, stating:

> [N]otwithstanding the efforts of all parties, it has proven impossible to arrive at the degree of consensus which is necessary for a Joint Report. Therefore, the United States and the City Board felt constrained to prepare and submit the present Report independently from the State defendants . . . . Several draft plans have been circulated by the State . . . but none of them addresses the requirements of the Order to a degree sufficient to reach or even approximate compliance.

Following a thorough review of the State's plan, Judge Meredith issued an order and memorandum, on December 19, 1980, stating:

> It is the opinion of this Court that the plan submitted by the State of Missouri is insufficient for this Court to make a determination as to whether or not it is feasible to pursue further the voluntary avenues of integration with the County schools.

The Judge ordered the State of Missouri to "submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981." Further, the Judge ordered:

> The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan.

Continuing Delay

On January 28, 1981, State defendants filed a motion for a stay of Judge Meredith's order of December 19, 1980.

The parties to this action have filed three motions in opposition to State defendants' motion for stay; one motion has been filed in favor:

1. In Opposition—February 2, 1981, Response of the United States in Opposition to Motion for Stay of this Court's Order of December 19, 1980.

2. In Opposition—February 5, 1981, Board's Response to State's Motion to Stay Order of December 19, 1980 and to State Report under Paragraph 12(a).

3. In Opposition—February 12, 1981, Adams, Plaintiff-Intervenor's Memorandum in Opposition to All Motions for Stays and Further Delays.

4. In Support—February 4, 1981, Suggestions of the Special School District[1] of St. Louis County in Support of State Defendant's Motion to Stay the Order of the Court of December 19, 1980.

On February 2, 1981, State defendants filed a Report Pursuant to the Court's Order of December 19, 1980. The Report states in part that State defendants are unable to file a "meaningful, workable, voluntary plan which is educationally sound," because State defendants were unable to gather necessary data and information due to the threat of future interdistrict litigation.

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[1]The Special School District is itself resisting an order of the Eighth Circuit Court of Appeals to integrate vocational schools. ("We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year." *Liddell* v. *Board of Education of the City of St. Louis, supra,* slip op. at 19.) *In re Special School District of St. Louis County,* No. 80-1456 (8th Cir., Aug. 15, 1980) (denying petition for writ of prohibition), reh. den. (8th Cir., Sept. 10, 1980). *See also Special School District of St. Louis County* v. *Mallory,* No. 80-876-C(5) (E.D. Mo., Sept. 23, 1980) (dismissing request for injunction and declaratory judgment); *Special School District* v. *Mallory,* No. 80-1155-CV-C (W.D. Mo., filed July 1, 1980) (petition for injunction and declaratory judgment).

On February 13, 1981, the Eighth Circuit Court of Appeals denied State defendants' motion for a stay of Judge Meredith's December 19, 1980, order. State defendants filed a notice of appeal of the December 19 ruling to the Eighth Circuit Court of Appeals on February 17, 1981. Notice was filed without a request for certification by the district court under 28 U.S.C. § 1292.

Eighth Circuit Court of Appeals Opinion: February 13, 1981

The Eighth Circuit Court of Appeals upheld Judge Meredith's May 21, 1980, Order, stating:

> We note that the district court has found it necessary to extend the deadlines for filing the proposed plans under paragraph 12(a)-(c) and that it is apparently having some difficulty in getting complete and adequate proposals from the parties. We take this opportunity to stress the legal obligation of the State of Missouri, the United States and the Board of Education to develop and implement the plans contemplated by paragraph 12. It is imperative that the district court countenance no excuse for further delay.

Liddell v. *Board of Education of the City of St. Louis, supra,* slip op. at 20 n.6.

On February 26, 1981, this Court denied the motion which State defendants filed on January 28, 1981, for a Stay of Judge Meredith's December 19, 1980, order. Judge Meredith's order required defendants to file a plan on February 2, 1981, and a report on March 2, 1981.

II. *Grounds for Contempt Proceedings.*

The foregoing public record reveals extraordinary machinations by the State defendants in resisting Judge Meredith's orders. In these circumstances, the Court can

draw only one conclusion. The State has, as a matter of deliberate policy, decided to defy the authority of the Court.

Let there be no misunderstanding. This is not a simple case of a private litigant failing to take proper measures to comply with the Court's orders. This case is quite different. The public interest is involved to a much greater extent when a party's actions serve to undercut the implementation of the Court's desegregation orders. *See Morgan* v. *McDonough*, 540 F.2d 527, 533-34 (1st Cir. 1976), affirming the district court's power to fashion an extraordinary remedy to deal with intransigent and obstructionist officials who failed to engage in cooperative, voluntary efforts and continuously resisted desegregation in a pattern of defiance and delay.

The constitutional dimensions, so important and so far-reaching in dealing with the rights of children and their parents and guardians in school desegregation cases, demand full respect of the federal court system. *See Harvest* v. *Board of Public Instruction of Mantee County, Florida*, 312 F.Supp. 269, 274-75 (M.D. Fla. 1970), denying a motion to stay a mandatory injunction requiring school desegregation.

To grant the State defendants a stay would permit the State to escape triumphantly from the consequences of its defiance of Judge Meredith's orders. If the State's position rests on a correct view of the law, it follows that the law can be flouted and brought into disrepute by the defendants with impunity.

The Court would be doing much less than its duty if the State defendants were not held accountable for their actions. Where there has been willful disobedience to an order of the court and a measure of contumacy on the part of the defendant, inveterate principles of both equity and

the common law mandate that the Court exercise jurisdiction to punish for contempt of court. *See* 8 *Halsbury's Laws of England* 20 (3d ed. 1968), delineating the punitive jurisdiction of court's contempt power as founded upon the good, not of the plaintiffs or of any party to the action, but of the public.

The power to punish for contempt is a drastic remedy. Contempt jurisdiction should be exercised with the greatest caution. If this Court's orders are complied with, there will be no need for contempt proceedings. If they are not executed, the Court will order the State defendants, the City Board of Education and the United States to show cause why they should not be found in contempt.

III. *Avoidance of Contempt Proceedings Compliance with Court Orders*

The State defendants, in conjunction with the Board of Education of the City of St. Louis and the United States, [the Polities], shall comply with Judge Meredith's orders within sixty days of the date of this order, with an interim progress report to be filed within thirty days. If the Polities, jointly and/or individually, fail to comply, this Court may accept plans submitted by any parties to this suit or by a Special Master and/or a Review Panel appointed by this Court. Failure of State defendants, the City Board of Education, and the United States to submit an interim plan in compliance with this order within thirty days can result in the issuance of an order of contempt.

Failure of the Polities to submit a plan jointly and/or individually, will leave this Court no alternative but to initiate contempt proceedings against the recalcitrant Polity or Polities. This Court will be left no alternative but to adopt a plan to remedy the effects of constitutional violations. The power of the Court in this regard is well estab-

lished. *See Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955) ("In fashioning and effectuating the decrees, the courts will be guided by equitable principles Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."); *Morgan* v. *McDonough, supra* at 533 ("A district court's power to fashion and effectuate desegregation decrees is broad and flexible and the remedies may be 'administratively awkward, inconvenient, and even bizarre.' *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 15-16 (1971)."); *Morgan v. Kerrigan*, 509 F.2d 599, 600 (1st Cir. 1975) ("The district court found pervasive violations of the constitutional rights . . . . The court's obligation is to rectify those violations, availing itself in so doing of the breadth and flexibility inherent in equitable remedies."); *Davis* v. *School District of the City of Pontiac, Inc.*, 487 F.2d 890, 891 (6th Cir. 1973) ("Once a past constitutional violation has been established, 'the scope of a district court's equitable power to remedy past wrongs is broad . . . .'"); *Hart* v. *Community School Board of Brooklyn*, 383 F.Supp. 699, 755-56 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) ("Having found a violation, the court has broad equitable powers to order changes designed to eliminate future misconduct and to reduce the effect of prior violations. . . . That a decree may require expenditure of public funds is no bar to corrective action."). *See also* Berger, Curtis J., *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978) (delineating the extensive role delegated by the court to a special master in *Hart* v. *Community School Board of Brooklyn, supra*, to design a plan to desegregate schools in south Brooklyn, New York).

In order to ensure that a plan is in fact produced in a timely manner for this Court's consideration,

IT IS HEREBY ORDERED that Edward T. Foote, Chairman of the Desegregation Monitoring and Advisory Committee, shall prepare and file a plan by March 27, 1981, in accordance with Judge Meredith's orders of May 21, 1980, paragraph 12(a) and December 19, 1980.

IT IS HEREBY FURTHER ORDERED that Dr. Gary Orfield, the court appointed expert, shall review the study as submitted by the Chairman within ten days following filing of such plan, and report to the Court his findings and recommendations.

IT IS HEREBY FURTHER ORDERED that nothing herein relieves the obligation of the Polities to comply with the orders of Judge Meredith.

IV. *Board's Motion to Stay Discovery*

The Eighth Circuit Court of Appeals, on February 13, 1981, stated: "We see no reason to prevent the opening of a consolidated integrated vocational school at the beginning of the 1981-1982 school year." *Liddell v. Board of Education of the City of St. Louis, supra,* slip op. at 19.

In an effort to facilitate and expedite voluntary and cooperative planning, this Court grants a stay of discovery for a period of sixty days from the date of this order, except insofar as discovery relates to the Special School District and requirements under paragraph 12(b) of Judge Meredith's May 21, 1980, order.

IT IS HEREBY ORDERED that discovery is stayed for a period of sixty days from the date of this order, except insofar as discovery relates to the Special School District and requirements under paragraph 12(b) of Judge Meredith's May 21, 1980, order.

V. *Protective Order*

The Protective Orders issued by Judge Meredith on June 17, 1980, and October 6, 1980, remain in full force and effect, to-wit:

> IT IS HEREBY SPECIFICALLY ORDERED that nothing any of the parties may do pursuant to these previously mentioned Orders will in any way prejudice their position on appeal and they will be deemed to have done such actions under order of the Court.
>
> * * *
>
> IT IS FURTHER ORDERED that any school district of St. Louis County that enters into a plan of voluntary cooperation with the School Board of the City of St. Louis will not in any way prejudice its legal rights to oppose or resist a suit or orders requiring compulsory cooperation.

And,

> IT IS HEREBY SPECIFICALLY ORDERED that nothing any of the parties may do pursuant to the order of this Court of September 17, 1980, will in any way prejudice their position on appeal and they will be deemed to have done such actions under order of the Court.
>
> * * *
>
> IT IS FURTHER ORDERED that any school district of St. Louis County that enters into a plan of voluntary cooperation with the School Board of the City of St. Louis will not in any way prejudice its legal rights to oppose or resist a suit or orders requiring compulsory cooperation.

In order to facilitate cooperative and voluntary planning in this suit, the Court emphasizes that:

IT IS HEREBY FURTHER ORDERED that any settlement discussions, negotiations, proposals, or responses to proposals arising in connection with the development of a voluntary cooperative desegregation plan shall not be used in evidence in this case.

Dated this 4th day of March, 1981.

United States District Judge
William Hungate

APPENDIX I

Michigan Statutes Cited By United States Supreme Court in *Milliken I* as Establishing Local Autonomy	Corresponding Missouri Statutes
1. Mich.Comp.Laws, Section 340.27, 340.55, 340.107, 340.148, 340.149, 340.188 (1967). School districts are described as autonomous political bodies corporate, operating through boards of education popularly elected.	Sections 162.461, 162.511, 162.571, 162.621 RSMo 1978.
2. Mich.Comp.Laws, Sections 340.24, 340.26, 340.77, 340.113, 340.165, 340.192, 340.352 (1967). School districts have plenary power to acquire real and personal property.	Sections 160.011, 162.441, 162.461, 162.571, 177.011 RSMo 1978.
3. Mich. Comp.Laws, Section 340.569, 340.574 (1967). School districts have plenary power to hire and contract with personnel.	Chapter 168 RSMo 1978.
4. Mich.Comp.Laws, Section 340.563 (1967). School districts have plenary power to levy taxes for operations.	Sections 164.011, 164.021, 164.071 RSMo 1978 (with a minimum levy requirement for Missouri state aid under Section 163.021 RSMo 1978.)

5. Mich.Comp.Laws, Sec-340.575 (1967). School districts have plenary power to determine the length of school terms.	Section 171.031 RSMo 1978.
6. Mich.Comp.Laws, Section 340.582 (1967). School districts have plenary power to control the admission of non-resident students.	Section 167.151 RSMo 1978.
7. Mich.Comp.Laws, Section 340.583 (1968). School districts have plenary power to determine courses of study.	Section 171.011 RSMo 1978 (with minimum requirements for materials and subjects set forth in Chapter 170 RSMo 1978).
8. Mich.Comp.Laws, Section 340.584 (1967). School districts have plenary power to provide a kindergarten program.	Sections 163.013, 163.017 RSMo 1978.
9. Mich.Comp.Laws, Section 340.585 (1967). School districts have plenary power to establish and operate vocational schools.	Sections 178.450, 178.490, 178.530 RSMo 1978.
10. Mich.Comp.Laws, Section 340.586 (1967). School districts have plenary power to offer adult educational programs.	Sections 171.091, 171.096 RSMo 1978.
11. Mich.Comp.Laws, Section 340.589 (1967). School districts have plenary power	Sections 177.091, 177.131, 177.161, 171.011 RSMo 1978 (derived from the power to

to establish attendance areas.	select sites and establish an adequate number of schools, coupled with the power to make all needful rules and regulations.)
12. Mich.Comp.Laws, Section 340.591 (1967). School districts have plenary power to arrange for the transportation of non-resident students.	Sections 167.231, 167.241, 163.161 RSMo Supp. 1980 (with state aid in Missouri computed for the transportation of certain eligible students, and with the district of residence being required to provide transportation in certain instances where non-resident students are assigned to a school.)
13. Mich.Comp.Laws, Section 340.594 (1967). School district have plenary power to acquire transportation equipment.	Section 167.251 RSMo 1978.
14. Mich.Comp.Laws, Section 340.605 (1967). School districts have plenary power to receive gifts and bequests for educational purposes.	Section 165.011 RSMo 1978.
15. Mich.Comp.Laws, Section 340.609 (1967). School districts have plenary power to employ any attorney.	Sections 162.411, 162.511, 162.571 RSMo 1978.
16. Mich.Comp.Laws, Section 340.613 (1967). School districts have plenary power to suspend or expel students.	Sections 167-161, 167.171 RSMo 1978.

17. Mich.Comp.Laws, Section 340.614 (1967). School districts have plenary power to make rules and regulations for the operation of school.	Section 177.011 RSMo 1978.
18. Mich.Comp.Laws, Section 340.711 (1967). School districts have plenary power to acquire property by eminent domain.	Section 177.041 RSMo 1978.
19. Mich.Comp.Laws, Section 340.882 (1967). School districts have plenary power to approve and select textbooks.	Section 170.051 RSMo 1978 (with Missouri districts required to purchase and loan free all textbooks chosen from lists filed with the State Board of Education, the districts retaining additional authority to expend textbook monies and incidental fund money for the purchase of supplementary texts and materials.)
	Missouri Constitutional Provisions
	Constitution of Missouri Article III
	Section 40: Limitations on passage of local and special laws. The general assembly shall not pass any local or special law:

(20) creating new townships or changing the boundaries of townships or school districts;

(21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;

(24) regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	No. 72-100C(4)

CONSENT DECREE

This school desegregation action charging illegal racial segregation and discrimination was initiated as a class action on February 18, 1972. Detailed histories of this case are set out in the Court's opinion of April 12, 1979, *Liddell v. Board of Education,* 469 F. Supp. 1304, 1309-12 (E.D. Mo. 1979), 491 F. Supp. 351 (1980), and in the Court of Appeals for the Eighth Circuit's previous opinions in *Liddell* v. *Caldwell,* 546 F.2d 768, 769 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977), and in *Adams v. United States,* 620 F.2d 1277, 1281-84.

The subject matter of this Order concerns the area vocational schools of the City of St. Louis and the Special School District of St. Louis County, and the delivery of services to secondary students at those schools and possibly at community based or magnet vocational technical programs.

This Court on May 21, 1980 ordered as a remedy in paragraph 12(b):

a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

On September 12, 1980, the Court granted the motion of the Caldwell plaintiff-intervenors to join the Special School District of St. Louis County as a party defendant to this litigation.

The Court of Appeals in its February 13, 1981 opinion affirmed the May 21, 1980 Order of this Court. *Liddell v. Board of Education,* No. 80-1458, etc. (8th Cir.).

On May 4, 1981 Stipulations of Fact were filed with this Court signed by all parties except the *Liddell* plaintiffs.

Pursuant to paragraph 12(b) of the Court's May 21, 1980, remedial order, both the City Board and the State defendants submitted proposed plans on December 15, 1980 concerning vocational educational programs. The City Board's proposal suggested expanding the Special School District's boundaries to include St. Louis City, to serve both the vocational and special education needs for St. Louis City and St. Louis County. The proposal recommended as a desegregation goal a ratio of two white students to one black student at each traditional site involved, and the implementation of community based and magnet vocational programs. Additionally, to implement the City Board's proposal as submitted requires that the Court appoint an interim nine (9) member board of education for the district and empower the board to levy a tax of $.55 to support the basic cost of vocational and special education. The effect of the levy would be to increase the tax rate in the City by $.55.

The State defendants' proposal suggests that the City Board and the Special School District initiate at least 20%

of their offerings on a half day basis, give consideration to operating the programs at O'Fallon and North and South County Technical Schools as well as other unused schools on a three session a day and/or year round basis, and initiate joint community based programs. Student transfers between the City Board and Special School District programs would be on a voluntary basis, no specific desegregation goals are contained in the proposal, and the implementation of the plan as submitted would require increased expenditures by the City Board and Special School District.

The Special District was not required to submit a plan to the Court, but submitted a proposal on March 24, 1981. The substantive portion of that proposal primarily concerns placing City students in the Special School District's vocational programs, in prescribed numbers under certain conditions, and is not specifically designed to address the desegregation of O'Fallon Technical School.

On March 4, 1981 the Court set a hearing on May 11, 1981 to consider the issues concerning the Special School District, and established pre-trial procedures for the hearing. On subsequent dates the Court established the agenda for the hearing and the order of the presentation of issues and evidence regarding paragraph 12(b).

On May 8, 1981 the Special School District lodged another proposal with the Court. That document served as a basis for extensive negotiations which resulted in the plan attached to this decree.

The parties consenting to the entry of this decree have in numerous filings with this Court, the Court of Appeals and the United States Supreme Court stated their positions as to the facts and law regarding the issues surrounding paragraph 17 of this Court's Findings of Fact and Conclusions of Law of June 3, 1980 and paragraph 12(b) of this Court's order of May 21, 1980. By consenting hereto

no party retracts its previous position or concedes that its respective positions are in any way erroneous. However, the parties being desirous of implementing a solution to the issues concerning paragraph 12(b) of the May 21, 1980 order without the expense of litigation, have agreed to the entry of the decree, and the Court being of the opinion that the entry of this decree will effectuate federal law, now therefore:

IT IS ORDERED, ADJUDGED, AND DECREED, that:

1. The Special School District of St. Louis County, the Board of Education of the City of St. Louis and the State of Missouri shall implement the "VOCATIONAL EDUCATION PLAN FOR THE BOARDS OF EDUCATION OF THE CITY OF ST. LOUIS AND THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY" attached hereto.

2. By April 1 of each school year, as described on page 7 of the plan attached hereto, the Committee pursuant to the attached plan shall file with the Court an annual plan, approved by the respective Boards, which describes the steps to be taken to reach the goals indicated in the plan for the next school year.

3. If any party objects to an annual plan or to any provision of an annual plan submitted to this Court as required in paragraph 2 of this Order, that party must file notice of the objection with this Court within thirty days (30) from the date the plan is filed with this Court. If objections are filed, a hearing will be set on the objections at a subsequent date.

4. The progress made in implementing the plan will be reported by the Committee to the Court pursuant to page seven of the attached plan. Additional data reports

shall be filed on October 31, 1981 and on March 31, 1982 and on the same dates annually thereafter until further order of the Court. The reports shall contain:

A. The following information by home district, grade level, program and race:

   a) The number of students enrolled in each school or site;

   b) The number of students assigned since the last report to a school or site other than his/her first choice for the purpose of achieving racial goals, and the number who did not accept the assignments.

B. The number of slots available for juniors and seniors at each school or site;

C. A description of the recruitment activities undertaken by either Board or the Committee since the previous report;

D. A description of the measures taken since the last report by each district to achieve parity;

E. All programs moved from one district to another, and the teachers assigned by race, to such moved programs;

F. All unduplicated and magnet programs developed since the last report and their locations;

G. Brief description of any present or proposed construction of expansion of vocational education facilities;

H. Statement whether either District has sold or abandoned any vocational education facility, equipment, or supplies having a total value of more than $500.00 since the previous report.

5. After the completion of the 1985-86 school year, the Court will review the progress made and assess whether the goals of the plan have been met. In the event the goals

are not met, upon motion of a party, and after a hearing, the Court may either order a complete merger of the vocational programs with a unified governing and taxing structure, modify the plan attached hereto, or adopt any other plan in accordance with paragraph 12(b) of the May 21, 1980 order.

6. Funds to meet the commitments of the State Defendants to the plan approved this date shall be made available by the State Defendants and the Missouri General Assembly subject to and in compliance with any applicable provisions of law.

7. In arriving at this Consent Decree, no party has consented to the award of litigation costs and/or reasonable attorneys' fees. This matter is reserved for such further negotiations and/or proceedings, including applications to the Court, as may be appropriate following the Court's approval of this decree.

8. All previous orders of this Court not inconsistent herewith remain in full force and effect.

9. This Court retains jurisdiction of this action for all purposes, including the entry of such additional orders as may be necessary or proper.

SO ORDERED this 21st day of May 1981.

WILLIAM L. HUNGATE
UNITED STATES
DISTRICT JUDGE

AGREED TO:

FOR THE
UNITED STATES
CRAIG M. CRENSHAW, JR.

FOR THE SPECIAL
SCHOOL DISTRICT OF
ST. LOUIS COUNTY
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APPENDIX K

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

CRATON LIDDELL, a minor, et al., *Plaintiffs,* v. BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, et al., *Defendants.*	No. 72-100-C-(4)

STIPULATIONS

Come now the parties hereto and enter into the following stipulations pursuant to the Court's Order of March 4, 1981:

1. In Missouri, a student does not need vocational training to fulfill secondary graduation requirements.

2. In 1965, Missouri enrolled 56,553 secondary school students in vocational programs. In 1980, 157,270 were enrolled.

3. Commissioner Mallory has said that the students need another vocational high school in the City of St. Louis.

4. Some students elect to attend vocational schools, even when they must travel an additional 30-50 minutes by bus after they get to their home school.

5. Vocational education training is delivered, in Missouri, at comprehensive high schools, junior colleges, and

area vocational schools (AVS). Enrollment is open to secondary students, post secondary people and adults.

6. The term "area vocational school" is a term of art and a comprehensive high school in a school district or a junior college system may be designated an area vocational school.

7. The State's "Handbook for Accreditation" defines an AVS as that part of a school district which has been designated by the State Board of Education to provide vocational education for its students and students from other specified school districts.

8. The designation as an AVS by the State Board of Education makes a district eligible for additional financial support to serve vocational needs.

9. Participation by other school districts outside the district which is designated by the State Board as the AVS for the area depends in part on the participating districts ability to pay the tuition.

10. The State Board has requested as a maximum the payment of 50% of the instructor's salary and 50% of the approved equipment and teaching aids for approved AVS vocational programs. Additionally, for approved projects the State Board will request of the legislature, on behalf of an AVS, that funds not to exceed 50% of construction costs of new facilities, or the modification of existing structures be made available. These funds are in addition to any State foundation funds a district would otherwise receive for educating a student.

11. Since 1965 the Department of Elementary and Secondary Education has been actively involved in the process of developing an AVS network. These schools are intended to be located in centralized communities and provide vocational education for students in surrounding school districts.

12. The AVS system provides an opportunity for students of several districts to participate in vocational subjects and use equipment which could not otherwise be provided. As a result, the duplication of placing expensive vocational courses in schools which are located close together is minimized.

13. The purpose of an AVS is to provide over a wide geographic area, vocational education programs for secondary students, post-secondary age people, adults, and individuals with special vocational needs.

14. The State Board has the power to refuse to grant AVS status to an applicant district and the state has de-designated one district upon agreement of that district and designated a different district in the same geographic area upon that district's consent.

15. The State Board is charged with the responsibility of establishing standards and inspection, as a basis for approval for funding all vocational programs. This is done with respect to site, plant, equipment, qualification of teachers, admission of pupils, courses of study and methods of instruction.

16. The State Board also is charged with the responsibility of making the final decision whenever there is disagreement between an AVS and a participating district with respect to the amount of tuition charged by the AVS.

17. In 1957 the Missouri legislature authorized voters in counties of the first class to organize and create a special school district for the education and training of handicapped children. In 1957 the Special School District for St. Louis County (SSD) was created by a vote of the people of St. Louis County pursuant to the enabling legislation. It was the only special district in the State at that time.

18. There have been only two special school districts created in Missouri, the Special School District of St. Louis County which was established in 1957, and Pemiscott County Special School District which was established in 1973.

19. The voters of St. Louis County approved the expansion of the SSD's responsibilities to include vocational education in a special election on June 22, 1965. The SSD applied for area vocational school status and the Missouri State Board of Education designated SSD as an AVS on September 24, 1965.

20. In 1965, the year SSD was designated as an AVS, O'Fallon Technical School (O'Fallon) had a student enrollment of 2548 of whom 1613 (63%) were black.

21. The State Board of Education designated the School District of the City of St. Louis as an AVS on March 31, 1967.

22. In 1967, the year the City Board was designated an AVS, O'Fallon's student enrollment was 2357 students, 80% black.

23. In 1968 the student enrollment of SSD's South County Technical School was 440 students of whom 19 were black (4%). In 1968 the student enrollment of SSD's North County Technical High School was 290 students of whom 10 were black (3%). The public school enrollment of the service areas in 1968 were approximately 63.5% black at O'Fallon and 5.7% black for the SSD. Thus the service areas combined enrolled approximately 84,575 black students of which 87% resided in the O'Fallon service zone and 13% in the SSD. Of the 1908 black students who actually attended an AVS, approximately 98.5% attended school in the City.

24. In Missouri there are presently 59 school districts which have AVS designation involving 377 school districts enrolling 35,513 second students, 3,045 post-secondary people, and 51,222 adults. Of these 59 districts, two are special school districts: Special School District of St. Louis County; and Pemiscott County Special School District.

25. The State Board of Education has not approved any new vocational education programs for funding for which the governing boards of the St. Louis Public Schools and the Special School District of St. Louis County have certified that they have met and discussed procedures to permit students to transfer to the district offering the program.

26. State funds contribute toward the construction of SSD's West County Technical School.

27. The SSD vocational program is housed at North County Technical School which opened in 1968, and South County Technical School which opened in 1968, and South County Technical School which opened in 1967. Each school has in excess of 70 shops, laboratories, and classrooms combined. West County Technical School is presently under construction and is scheduled to open in 1982 and will accommodate 920 students.

28. O'Fallon is presently under the control of a 12 member St. Louis City Board of Education. The SSD program is under the control of a 6 member Board. Both Boards are elected.

29. The vocational program of SSD is also a full day program during which both vocational and academic instruction is provided and credit is earned toward meeting graduation requirements. But in contrast to the City Board's 4 year program, the SSD program covers grades 11 and 12 only.

30. The program at O'Fallon is a full day program during which both vocational and academic instruction is provided and credit is earned toward meeting the City Board's graduation requirements. The program covers grades 9, 10, 11, and 12.

31. Students at O'Fallon are issued Bi-State passes and take public transportation to school. Students at North County and South County Technical Schools are transported to school by school bus. The SSD transports 996 students to South County Technical School using 31 buses of various sizes and 1,313 to North County Technical School using 46 buses of various sizes.

32. The salary scales for teachers in the City of St. Louis' Public Schools and SSD differ as to the respective retirement systems, teacher's unions and tenure provisions.

33. SSD has the authority to levy a fifty-five cents (55¢) tax for the support of educational services. The levy provides forty-five cents (45¢) for general operating services and ten cents (10¢) for building fund purposes. The remainder of its revenues come from State, Federal, and County funds.

34. The St. Louis Public Schools have a total levy of $3.65; $3.48 for general operating services and seventeen cents (17¢) for the retirement of bond debt.

35. The parties all stipulate to the authenticity of all exhibits identified at conference the mornings of April 30, 1981, and May 1, 1981.

36. The response of the SSD to United States' First Request for Production of Documents is an accurate copy of the only application the SSD has ever made for AVS status.

37. The response of the SSD to Request number 2

of the United States' First Request for Production of Documents, viz. "The Special School District of St. Louis County", a survey of the League of Women Voters 1978, "Counselor Handbook", "The Handbook of Operation of the SSD St. Louis City" and 22 assorted one-page brochures, constitute all publications, documents or memoranda on the history, organization and procedures of the Vocational Education Program of the SSD in the possession of the Special School District.

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APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CRATON LIDDELL, et al., *Plaintiffs,* v. THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, et al., *Defendants.*	No. 72-100C(4)

SUPPLEMENTARY STIPULATION OF FACTS

1. The Special School District is an independent local school district governed by a six-member Board of Education Sec. 162.261 *et. seq.*, RSMo.

2. Under Missouri law the Special District is a political subdivision of the State of Missouri and a corporation which can sue and be sued in its own name. Sec. 162.875 RSMo.

3. In 1965, pursuant to additional enabling legislation, by vote of the people of St. Louis County, Missouri, the charge of the Special District was expanded to include the offering of vocational education to high school juniors and seniors in St. Louis County.

4. On June 3, 1980, Judge James H. Meredith rendered Findings of Fact and Conclusions of Law in this case finding *inter alia* that:

> 17. The existing dual system of vocational education split between the City and St. Louis County is neither educationally sound nor administratively efficient. These systems, established in 1965 and 1967, are further evidence of the continuing failure of the State to take any effective measures to disestablish the dual system in the State. The State has the power to effectively merge these systems. Its failure to exercise that power is part and parcel of its failure to take affirmative steps to eradicate, root and branch the dual system it once formally mandated. (p. 8)

5. On May 21, 1980, Judge Meredith entered an order which contained the following paragraph:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> b) To develop and submit to the Court by November 1, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational education programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

6. At the time of the original trial of this case against the Board of Education of the City of St. Louis, the Special School District was not a party to this case.

7. At the time of the remedy hearing held in May, 1980, the Special School District was not a party to this case.

8. The Special School District was joined as a party defendant in this case pursuant to a motion of the Caldwell plaintiffs-intervenors (NAACP), which was granted on September 12, 1980.

9. On March 24, 1981 the Special School District made public a description of a voluntary plan of pupil transfers

between the vocational program of the City of St. Louis and that of the Special School District.

10. One of the two lawsuits referred to in the NAACP's Amended and Supplemental Complaint against the Special School District, *Special School District of St. Louis County v. Arthur L. Mallory, et al.*, United States District Court, Eastern District Missouri, No. 80-0876-C(5), was dismissed *sua sponte* by Judge Cahill on September 23, 1980. The Special School District voluntarily dismissed its appeal of said decision on February 6, 1981.

11. The second of the two lawsuits referred to in the NAACP's Amended and Supplemental Complaint against the Special School District, *Special School District of St. Louis County, Missouri, v. Arthur L. Mallory*, et al., was originally filed in the Circuit Court of Cole County, Missouri, No. CV180-570CC, and has since been removed to the United States District Court for the Western District of Missouri, No. 80 4155 CV C. On April 29, 1981, the Special School District forwarded to the Western District by mail a voluntary dismissal of that lawsuit.

12. There are no white transfer students from the school district of the City of St. Louis presently enrolled in the vocational educational program of the Special School District.

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NO. 81-2022

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI, ET AL.,

Petitioner

vs.

CRATON LIDDELL, ET AL.,

and

EARLINE CALDWELL, ET AL.,

and

JANICE ADAMS, ET AL.,

and

BOARD OF EDUCATION OF THE CITY OF OF ST. LOUIS, MISSOURI, ET AL.,

and

THE CITY OF ST. LOUIS, MISSOURI

and

THE UNITED STATES OF AMERICA

Respondents

BRIEF FOR THE LIDDELL PLAINTIFFS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS' BRIEF

1. Whether this Court's decision in Hills v. Gautreaux was intended to modify this Court's decision in Milliken v. Bradley and if not, whether this Court's decision in Hills v. Gautreaux permits implementation of an interdistrict remedy which would restructure the operation of a state governmental entity, based only on an intradistrict violation?

2. Whether a school district established after Brown v. Board of Education and not part of a mandated dual system of education is under an affirmative duty as established by Green v. School Board of New Kent County, Virginia or under the standard established in Keyes v. School District No. 1 requiring specific purpose and intent to segregate?

3. Whether the District Court's order rejecting a consent degree but then ordering implementation of an interdistrict remedy in excess of said consent decree, without a liability hearing or a finding of an inter-district violation and an inter-district effect, was beyond the District Court's jurisdiction and in conflict with this Court's decision in United States v. Armour and Company?

4. Whether petitioners were denied procedural due process guaranteed by the Fifth Amendment to the United States Constitution because they were found liable 1) without any pleadings filed against them 2) without notice that their liability was at issue and 3) without an opportunity in court to defend themselves?

TABLE OF AUTHORITIES

Cases:

ADAMS vs. U.S., 620 F.2d 1277 (8th Cir. 1980)

ADAMS vs. UNITED STATES, _____U.S. _____, 101 S.Ct. 88, 66 L.ed.2d 29 (1980)

BROWN vs. BOARD OF EDUCATION OF TOPEKA, 347 U.S. 483 (1954) (Brown I.)

ENGLAND vs. ECKLEY, 330 S.W.2d 738, 741 (Mo. banc 1959)

GREEN vs. COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA 391 U.S. 430 (1968)

HILLS vs. GAUTREAUX, 425 U.S. 284 (1976)

KEYES, ET AL. vs. SCHOOL DISTRICT NO. 1, 413 U.S. 189 (1973),

LIDDELL vs. BOARD OF EDUCATION, CITY OF ST. LOUIS, MO., 469 F. Supp. 1304 (E.D. Mo. 1980)

LIDDELL vs. BOARD OF EDUCATION, ST. LOUIS, MO., 491 F.Supp. 351 (E.D. Mo. 1980)

LIDDELL vs. CALDWELL, 546 F.2d 768 (8th Cir. 1976)

LIDDELL vs. BOARD OF EDUCATION, ST. LOUIS MO., No. 80-1458 (8th Cir. Mar. 19, 1981)

MILLIKEN vs. BRADLEY, 418 U.S. 717 (1974) Milliken I

MORRILTON SCHOOL DIST. NO. 32 vs. U.S., 606 F.2d 222 (1979)

MORRILTON, ET AL. v. U.S., 606 F.2d 222, 230 (1979)

PEOPLE v. DEATHERAGE, 401 Ill. 25, 81 N.E.2d 581

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STATE ex inf. GENTRY v. ARMSTRONG, 286 S.W.2d 705 (1926)

STATE vs. HOLMES, 231 S.W.2d 185 (Mo. en banc 1950)

TABLE OF AUTHORITIES (continued)

STATE ex rel McINTOSH vs. RAINEY, 397 S.W.2d 344, 346 (Mo.App. St.L.D. 1965)

SWANN vs CHARLOTTE-MECHLENBURG BOARD OF EDUCATION, 402 U.S. 1 (1971)

UNITED STATES vs. ARMOUR & COMPANY, 402 U.S. 673 (1971)

VILLAGE OF ARLINGTON HEIGHTS vs. METROPOLITAN HOUSING DEVELOPMENT HOUSING DEVELOPMENT CORP., 429 U.S. 252 (1977)

WALTERS v. CITY OF ST. LOUIS, 259 S.W.2d 377 (1953)

WASHINGTON vs. DAVIS, 426 U.S. 229 (1976)

STATUTES CITED

Missouri Constitution, Art. IX, Sub. Sec. 1(a).

Missouri Constitution, Art. III, Sub. Sec. 40(20)

RSMO. 160.011(6)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 810-2022

STATE OF MISSOURI, ET AL., PETITIONERS

VS.

CRATON LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CRATON LIDDELL, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 620 F.2d 1277 (8th Cir. 1980) Liddell, et al. v. Board of Education of City of St. Louis, et al., Liddell v. Board of Education of St. Louis (unpublished) Slip Opinion 80-1458 (Pet A-1): Court of Appeals, Eighth Circuit denying rehearing (Pet A-B); Liddell, et al. v. Board of Education of City of St. Louis, et al., Slip Opinion 81-1828 (Pet A-E).

The opinions of the District Court are unreported: June 11, 1981, Pet. Appendix C and July 2, 1981, Pet. Appendix D; and 469 F.Supp. 1304 (E.D. Mo. 1979), and 491 F.Supp. 351 (E.D. Mo. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1981 dismissing the State's Appeal of the District Court's order of June 11, 1981 (Pet A-43). On February 25, 1982 the Court of Appeals entered its order (Pet A-109) affirming the judgments of June 11, 1981 (Pet. A-43) and July 2, 1981 (Pet A-73) of the District Court. Petitioner filed for a Writ of Certiorari April, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Proceedings Below

This school desegregation suit was filed by Minnie Liddell, Barbara Goldsby, Samuel Yarber, Louise Moore and Lois LeGrand, all members of the Concerned Parents, an unincorporated organization, on behalf of themselves and all other school age children and their parents similarly situated in the City of St. Louis. Respondents alleged that the Board of Education had maintained and perpetuated an unconstitutional dual school system which violated their Fourteenth Amendment rights to equal educational opportunities.

Pursuant to a stipulation of facts filed in June, 1974 by the parties the Court issued a Consent Decree that admitted segregation in the city school system. Publication in January of 1976 of the consent decree invited all interested parties to express their concerns. The Caldwell group represented by the NAACP, moved

to intervene. The motion was denied. The Court of Appeals reversed, Liddell v. Caldwell, 546 F2d, 768 (8th Circuit). Cert denied, 433 U.S. 914 (1977). The Court of Appeals in its opinion suggested that United States and the Missouri Board of Education intervene. Liddell v. Caldwell, 546 F.2d 768 (8th Cir. 1976).

The State Board did not move to intervene. In May of 1977, Caldwell and the City Board moved to join as defendants the State of Missouri, the State Commissioner of Education and the State Board of Education. United States, amicus curiae, filed a memorandum in support of the motions. The District ordered the State of Missouri joined as a party defendant, July 13, 1977.

State of Missouri admitted that they were proper parties, but denied responsibility for school segregation in St. Louis. The District Court on July 13, 1977 announced it would hold a trial on the merits in order to determine the adequacy of the consent decree, 469 F.Supp. at 1311. The United States, Adams, City of St. Louis, et al., and Ruleo were granted leave to intervene.

After a trial of 37 days, in which the State of Missouri participated, the District Court found: 1) That prior to 1954, the constitution of Missouri mandated separate schools for black and white pupils; 2) This provision remained on the statutes until 1977; 3) The State Board of Education has always had constitutional and statutory authority (among other things) to supervise educational instruction and to determine the State's educational policies. The State Board of Education distributes foundation funds, according to a formula approved by the state legislature, approves school bus transportation funds requests and passes on application for federal

funds by school districts. After trial, the District Court originally found no constitutional violation by the defendants, Liddell v. Board of Education, City of St. Louis, et al., 469 F.Supp. 1304 (E.D. Mo. 1979); 4) It concluded that the St. Louis Board of Education had fulfilled its obligation to create a unitary school system in 1955 and 1956 by the adoption of a "neighborhood school policy."

On appeal, the Court of Appeals reversed and held that under the circumstances of this case, the District Court erroneously held that the establishment of a neighborhood attendance policy fulfilled the defendant's "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

The Court of Appeals directed that segregation in the elementary and secondary schools in St. Louis must now be eliminated and instructed the District Court to take necessary steps to bring about an integrated system. The City School Board, the United States and the State of Missouri were advised to implement a program of exchanging and transferring students with the suburban school districts.

After hearing, the District Court held that the State of Missouri which had previously required segregated schools legally, had an affirmative duty "to erase all vestiges of such state imposed segregation;" that the State of Missouri was a primary constitutional wrongdoer which abandoned its affirmative remedial duty to desegregate the school system, 491 F.Supp. 351; and ordered the State to take affirmative action to cure the ills of segregation. The District

Court approved the City Board's plan to desegregate the school system and Paragraphs 12a, 12b, 12c and 12d which addressed the 30,000 black pupils remaining in segregated schools in north St. Louis: 12a being a voluntary Plan, 12b merged the vocational educational schools of City and County, 12c called for a mandatory plan of desegregation and 12d called for a study or plan to determine the effects of housing on school desegregation.

The Court of Appeals Opinion

The Court of Appeals affirmed the District Court's orders of May 2, 1980, (Pet. A-1). The state's motion to stay this Court's order of February 13, 1981 ordering implementation of Paragraph 12, was denied (Pet. A-27). The Court of Appeals held that the State of Missouri was required to pay certain costs relating to implementation of the voluntary plan, and could adopt a plan to merge vocational educational programs. (Pet. A-109).

Summary of Argument

Plaintiff's Liddell, et al. Answers to
to Applicants Petition for Writ of Certiorari
as Reasons for Denying the Writ

I

THE COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S ORDER OF JULY 2, 1980, IS NOT IN CONFLICT WITH MILLIKEN VS. BRADLEY, NO. 1 IN THAT THE COURT FOUND DISTRICT WIDE AND STATE WIDE GOVERNMENTAL VIOLATIONS BY THE STATE OF MISSOURI AND ITS INSTRUMENTALITIES.

II

THE COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S ORDER OF JULY 2, 1980, IS NOT IN CONFLICT WITH APPLICABLE SUPERIOR OR INFERIOR STATE CONSTITUION OR STATUTORY PROVISIONS, OR GOVERNMENTAL STRUCTURE: AND IS NOT IN CONFLICT WITH HILLS V. GAUTREAUX.

III

THE COURT OF APPEALS' MANDATE OF FEBRUARY 25, 1982, AFFIRMING THE DISTRICT COURT'S ORDER OF JUNE 11, 1981, ORDERING THE STATE TO IMPLEMENT AN INTER-DISTRICT VOCATIONAL EDUCATION REMEDY IS NOT IN CONFLICT WITH THE GREEN OR KEYES CASES, OR WITH UNITED STATES V. ARMOUR AND CO.

IV

THE FINDING OF LIABILITY ON THE PART OF THE STATE OF MISSOURI BY THE DISTRICT COURT AND THE COURT OF APPEALS WAS NOT UNJUST AND UNFAIR AND DID NOT AMOUNT TO A DENIAL OF PROCEDURAL DUE PROCESS AS GUARANTEED BY THE AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT

DISCUSSION OF REASONS

FOR DENYING THE WRIT

I

THE COURT OF APPEALS' DECISION OF FEBRUARY 25, 1982, AFFIRMING THE DISTRICT COURT'S ORDER OF JULY 2, 1980, IS NOT IN CONFLICT WITH MILLIKEN VS. BRADLEY NO. I, IN THAT THE COURT FOUND DISTRICT WIDE AND STATE WIDE GOVERNMENTAL VIOLATIONS BY THE STATE OF MISSOURI AND ITS INSTRUMENTALITIES.

Paragraph 12(a) of the District Court's Order provides, in part, as follows: The state defendants and City board defendants shall "make every feasible effort" to work out a voluntary plan of interdistrict pupil exchange between the city school districts and the suburban districts.

"Paragraph 12(a) was designed to help remedy the proven unconstitutional segregation of the City schools as part of and in conjunction with the overall desegregation plan which we approved in Liddell II." See Note 4, Appeals Opinion, State's Brief Appendix E, P. A-114.

The Court of Appeals then made the statements about which the State complains:

> "Paragraph 12(a) is entirely enforceable against state defendant; they are primary constitutional wrongdoers and, therefore, can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district. Hills vs. Gautreaux, 425 U.S. 284 (1976)" Id. at 7.

The Court of Appeals had previously held in Adams, 620 F.2d at 1294 and n. 27, 1295, n. 28, also Liddell II, slip op. at 28 "that the State (of Missouri) had substantially contributed to the segregation of the public schools of the City of St. Louis,"

We submit that the State of Missouri not only "contributed", but required segregation of the public schools by constitutional mandate in Article IX, subsectionl(a) which set out:

> "General diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitious instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. Separate schools shall be provided for white and colored children, except in cases otherwise provided by law."

The above provision was not removed from the Missouri Constitution until 1976. Twenty-one years after Brown I and Brown II, 101 years after its enactment by the General Assembly in 1875, 4 years after this suit was filed in 1972, and 11 and 9 years respectively, after vocational education was established under state authorization in the City of St. Louis and St. Louis County. (State's Appendix, P. A-118).

There is no doubt that the State of Missouri constitutionally mandated and rigorously enforced de jure segregated public education in all school districts throughout the State of Missouri.

The State of Missouri contends that the decisions and holdings below are in conflict with Milliken No.1. The State claims that Milliken No. 1 stands for local autonomy in public education. We do not agree, but even if that were the basis of this Court's holding in Milliken No. 1, the Missouri situation and the Michigan situation are distinguishable. If the Michigan statutes (note 20, Milliken I) or properly interpreted by the State's Brief (Page 9), local control is provided by statute in Michigan in a state that never provided for dual racial public education, and where the state and interdistrict liability was sought to be a derivative of the liability of the City of Detroit:

> "...the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental powers of the federal courts to restructure the operation of local and state governmental entities." Hills vs. Gautreaux, 47 L.ed 2d 792, 801 (1976) citing the Swann cass and others.

Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." Hill case, 47 L.ed.2d l.c. 801.

Thus, the Missouri situation is different. Racial segregation in public education in the State of Missouri was constitutionally mandated and administered before 1954 and never dismantled by the State of Missouri after 1954. Racial segregation in all school districts in the State of Missouri was compulsory by reason of constitutional mandate and was absolute in all school districts by state law even if local option would have been different. This

difference between Michigan and Missouri is significant.

The State contends in its Brief on Page 9:

> "The Constitution of Missouri adopted by the people in 1945 even precludes the Missouri Legislature from enacting certain laws dealing with public education on the local level."

We disagree. Every authority of every school district in Missouri is authorized by legislative enactment pursuant to the State Constitution. The legislative power of the State of Missouri is a limitation of powers, and all that is not forbidden is authorized and the power is absolute unless in conflict with a federal power involving the exercise of the particular power. The Fourteenth Amendment to the United States Constitution and statutes enacted pursuant thereto are examples of such federal powers that limit state powers. (See also, U.S. Const. Art. 6, Sec. 2).

In the Missouri Constitution, Art. I, Section 40, subsection 20, it is there stated as a limitation on Missouri legislative powers that:

> "The general assembly shall not pass any local or special law . . . changing the boundaries of ... school districts;" (Emphasis added.)

The above cited limitation deals only with local or special laws and does not violate the right of the legislature to classify and enact legislations affecting the whole class. Examples: Counties: Art. VI, sec. 8; or to classify cities and enact legislations affecting the whole class of cities, Walters vs. City of St. Louis, 259 S.W.2d 377 (1953) which, as general laws, cover the state as a whole and apply to a reasonable and natural class. The determination of reasonableness is ultimately lodged with the Courts. State ex inf. Gentry vs. Armstrong, 286 S.W. 705 (1926).

The City of St. Louis is an example of a legislative act which affected only one city by definition when enacted, was a metropolitan school district; "Metropolitan School District ... any school district the boundaries of which are coterminous with the limits of any city which is not within a county;" R.S.Mo. 160.011(6).

In closing this point, it is significant to note that the Missouri Supreme Court, en Banc, in State ex rel vs. Holmes, 231 S.W. 2d 185, 191 (1950) stated:

> "The legislature has always, as a matter of policy, left to the residents voters the settlement of all questions involving the organization of school districts. ... (Emphasis added)
>
> The resident voters of the particular territory are the delegated agents of the Legislature to administer the enabling legislation, thereby implementing the legislative intent to obey the constitutional mandate of insuring the establishment and maintenance of free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years."
>
> Citing People vs. Deatherage, 401 Ill. 25, 81 N.E.2d 581.
>
> "This is not deemed or considered a prohibited delegation of legislative powers." State ex rel. vs. Andrae, 116 S.W. 561, 564 (Mo.)
>
> "The county boards of education who devise the plans for reorganization, the State Board of education, a constitutional body who must approve the plans and the voters of the district are delegated agents of the Legislature to administer this act." S.B. 307. State vs. Holmes, 231 S.W.2d 191. See also Morrilton etc. vs. U.S., 606 F.2d, 222, 230 (1979).

We submit to the Court that we have demonstrated that (1) in Missouri the local school district is merely an agency or arm of the state government and the source of its existence is state law; (2) The United States Constitution recognizes no governing units except the federal government and the states; (3) A contrary posi-

tion would allow a state to evade its constitutional responsibilities in the field of education by carving out small units and calling them local and autonomous; and (4) A state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities in the area of federal constitutional rights.

II

THE COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S ORDER OF JULY 2, 1980, IS NOT IN CONFLICT WITH APPLICABLE SUPERIOR OR INFERIOR STATE CONSTITUTIONAL OR STATUTORY PROVISIONS, OR GOVERNMENTAL STRUCTURE AND IS NOT IN CONFLICT WITH HILLS VS. GAUTREAUX.

Without aid from the State of Missouri these Respondents know of no state constitutional or statutory provisions, or state governmental structure that is superior to the Fourteenth Amendment to the United States Constitution and Article VI, Sec. 2 of the United States Constitution within the context of this lawsuit, and none has been cited.

However, it is claimed by the State of Missouri that Hills vs. Gautreaux, 425 U.S. 284 (1976) is in conflict with the Court of Appeals' decision affirming the District Court's orders of July 2, 1980. The State takes the above position because they claim that they "have not been found to have committed intentional segregative acts as was the case in Milliken I, supra, and Hills, supra, as required..."

These Respondents submit that both the State of Missouri and the City of St. Louis Board "have been found to have failed to dismantle the dual system" of education established by the State of Missouri and "which existed in Missouri prior to" Brown No. 1 and afterwards. This was intentional conduct in addition to other

specific instances found by the district Court.

There is no comparison between government structure as found in the school districts in Milliken No. I, Milliken vs. Bradley, 418 U.S. 717 (1974), Hills vs. Gautreaux, 425 U.S. 284 (1976), l.c. Note 20 and the school districts of Missouri which exist solely as subdivision, agents and arms of the state government carrying out delegated legislative functions. (Sec. No. I Supra). In Milliken I "the state's educational structure vested substantial independent control over school affairs in the local school districts. ... . In Milliken a consolidation order directed against the State would of necessity have abrogated the rights and powers of the suburban school districts under Michigan law." Note 13, 47 L.ed.2d 804. We submit that these factual constructions of the Michigan education system constitute the basic difference between Milliken I and Missouri. The effects of State policy permeates all school districts within the state and therefore

> "...every effort should be made by a federal court to employ these methods to achieve the greatest possible degree of (relief), taking into account the practicalities of the situation."
>
> Hills vs. Gautreaux, supra, l.c. 803.

Milliken does not stand for the inpermissibility of inter-district remedy. Hills vs. Gautreaux, supra l.c. 803. Further, it is erroneous to attempt to place the difference in holdings on the different subject matter of the lawsuits: housing and education. The fundamental question was the equitable power of the federal court to disrupt governmental subdivisions of a state without finding a constitutional violation.

III

THE COURT OF APPEALS' MANDATE OF FEBRUARY 25, 1982, AFFIRMING THE DISTRICT COURT'S ORDER OF JUNE 11, 1981, ORDERING THE STATE TO IMPLEMENT AN INTER-DISTRICT VOCATIONAL EDUCATIONAL REMEDY IS NOT IN CONFLICT WITH THE GREEN OR KEYES CASES, OR WITH UNITED STATES VS. ARMOUR AND CO.

A. The State suggests that the requirements of Green do not apply to this case and therefore the Appeals Court's mandate of February 25, 1982, is not applicable. Assuming that the distinction made by the State is correct, the application is faulty. Missouri has been in a state of constitutional violations from its inception and remains in violation because it has never corrected its de jure violations. Even now the State asks the aid of this Court to relieve it of all burdens of constitutional wrongdoing even as late as 1976 - 22 years after Brown I and 9 to 11 years after those segregated Vocational and Special Districts were established and financed pursuant to Missouri law and authorization. The State of Missouri would have the world to believe in its Brief on page 14 that when the people of St. Louis County voted in 1957 pursuant to statutory directions to establish the Special District they exercised a right independent of legislative authority as contained in the State Constitution. This is not so. The people voted as agents of the state legislature and by the authority delegated by the state legislature and not in their sovereign capacities. The action taken by the people under those circumstances as agents of the state legislature was tainted by the default of the delegating authority. See State ex rel vs. Holmes, supra (Mo. en Banc).

This situation is analogous to the role played by the people in convention or the state legislatures as federal agents in the ratification of amendments to the United States Constitution not in the sovereign capacities of the states or the people.

Even if intent to segregate is required, the deliberate failure of the State of Missouri to dismantle its de jure dual school system is more than sufficient.

B. The finding of the District Court in Liddell vs. Board of Education, 491 F.Supp. 351 (1981) are directed at the State of Missouri and "its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." This is not a joint application of the State of Missouri and the Special School District which is a political subdivision of the State with the power to sue and be sued unless the State is asserting its right as principal and the Special School District as Agent.

These Respondents submit that the law in Missouri is as presented by them No. I, supra.

C. The state's argument on behalf of the special School District is premature and not yet ripe for this application.

IV

THIS FINDING OF LIABILITY ON THE PART OF THE STATE OF MISSOURI BY THE DISTRICT COURT AND THE COURT OF APPEALS WAS NOT UNJUST AND UNFAIR AND DID NOT AMOUNT TO A DENIAL OF PRECEDURAL DUE PROCESS AS GUARANTEED BY THE AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State of Missouri claims that it has not had an oppurtunity to defend itself. The State has been a party co-defendant and active participant since 1977. The State has been actively and well represented by the Attorney General of the State of Missouri

at all hearings. It has called witnesses on its behalf and has cross-examined the witnesses of other parties. It has submitted pleadings and suggestions in support thereof. Respondents respectfully suggest that all actions taken by the State of Missouri (or failure to take action) were considered as tactical movements by the State of Missouri and they should not now be heard to complain.

There has been no unfair or unjust advantage sought or taken against the State of Missouri.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should not issue to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit rendered on February 25, 1982.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition of Respondents Liddell, et al., were mailed, postage prepaid, this 29th day of July, 1982 to all Counsel of Record.

William P. Russell

Opposition

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No. 81-2022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL. AND RESPONDENTS EARLINE CALDWELL, ET AL.

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BRIEF IN OPPOSITION OF RESPONDENTS BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, ET AL. AND RESPONDENTS EARLINE CALDWELL, ET AL.

Petitioners, the State of Missouri and certain state officers (hereinafter "Petitioners" or "State Defendants"), have asked this Court to issue a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Eighth Circuit entered on December 2, 1981 and February 25, 1982.[1] Because the decisions of the Eighth Circuit are correct and do not raise any questions that are worthy of re-

[1] The February 25, 1982 opinion is reprinted at page 109 of the Appendix ("App.") to the Petition for a Writ of Certiorari ("Pet."). The December 2, 1981 opinion is reprinted as Appendix A to this Brief.

view by this Court, Respondents the Board of Education of the City of St. Louis, Missouri, its members, officers, and administrators (hereinafter "City Board") and Respondents Earline Caldwell, *et al.* (hereinafter "Caldwell Respondents") urge this Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On March 3, 1980, the Eighth Circuit issued a decision holding that the State Defendants, in addition to the City Board, had failed to discharge their constitutional duty to dismantle the *de jure* racially dual school system in the City of St. Louis. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.) (*en banc*), *cert. denied*, 449 U.S. 826 (1980). As of 1954, a dual school system was required by both the Missouri Constitution and state statute. In its March 3, 1980 ruling, the Eighth Circuit found that following the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the State Defendants had failed to take affirmative steps to eliminate the racial segregation they had formerly imposed.

To remedy this constitutional violation, the Eighth Circuit ordered the District Court to adopt a city-wide plan of mandatory student transfers. The Court of Appeals recognized, however, that given the demographic composition of the City,[2] a substantial number of black public school students in St. Louis would remain in one-race schools despite the transfer plan. Consequently, the appellate court directed the trial judge also to consider other techniques, including voluntary student exchanges with suburban school districts, to reduce segregation in those schools that would remain all-black even after the desegregation plan was implemented. *Adams* v. *United States*, *supra*, 620 F.2d at 1296-97.

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[2] As of March 12, 1982, 79% of the students enrolled in the St. Louis public school system were black. *See* Fourth Report of the Board of Education Under Paragraph 14 of the District Court's Order of May 21, 1980, at 11 (filed March 31, 1982).

Neither the State Defendants nor the City Board sought review by this Court of the decision of the Eighth Circuit. Only plaintiffs-intervenors Adams, *et al.*, a group of white parents, filed a petition for a writ of certiorari. That petition was denied. *Adams* v. *United States*, 449 U.S. 826 (1980).

On remand, the District Court held a hearing and entered findings of fact and conclusions of law, determining, *inter alia*, that the State Defendants were "primary constitutional violators" because they had originally imposed and had then failed to dismantle the dual school system in St. Louis. *Liddell* v. *Board of Education*, 491 F. Supp. 351, 359-60 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 656 (1981). The State was therefore ordered to pay one-half of the cost of implementing the comprehensive city-wide desegregation plan proposed by the City Board and approved by the District Court. The City Board was required to bear the remaining cost. *Liddell* v. *Board of Education*, *supra*, 491 F. Supp. at 352-53.

The desegregation plan was implemented without incident at the beginning of the 1980-81 school year. Today, it is providing stable, integrated educational opportunities for many children who had formerly attended only one-race schools. The desegregation process has had no adverse effects on the school system; indeed, reading scores throughout the system have continued to improve since the implementation of the plan.

Nevertheless, as anticipated by the Eighth Circuit, the plan simply could not and has not achieved the total elimination of the dual school system in St. Louis. Instead, it has left approximately 30,000 of the 60,000 public school students in the City still attending one-race schools.

In accordance with the direction of the Eighth Circuit that it consider techniques for providing additional relief

to the students remaining in segregated schools, the District Court therefore ordered the State Defendants, the City Board, and the United States to develop "a voluntary, cooperative plan of pupil exchange" between the City school district and the surrounding suburban school districts. *Liddell* v. *Board of Education*, *supra*, 491 F. Supp. at 353 (paragraph 12(a)). The District Court also ordered the development of a plan "for the consolidation or merger and full desegregation of the separate vocational educational programs" operated by the City Board and the Special School District of St. Louis County. *Id.* (paragraph 12(b)).[3] The District Court found that the establishment in 1965 and 1967, and the continued existence thereafter, of separate vocational education programs in the City and in St. Louis County were "part and parcel of [the State's] failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated." *Liddell* v. *Board of Education*, *supra*, 491 F. Supp. at 358.

The State Defendants appealed the District Court's order and sought a stay pending appeal. This and seven subsequent requests for a stay by the State Defendants were denied either by the courts below or by this Court.[4]

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[3] The full text of paragraphs 12(a) and 12(b) of the District Court's order, as amended, is reprinted as Appendix B to this Brief.

[4] *See* Liddell v. Board of Education, 491 F. Supp. 351, 355 (E.D. Mo. 1980) (statement that no stay of the May 21, 1980 order will be granted); Liddell v. Board of Education, No. 72-100C(4) (E.D. Mo., Feb. 26, 1981) (denial of a stay of the requirement that the State prepare a voluntary interdistrict plan); Adams v. United States, No. 80-1458 (8th Cir., Aug. 15, 1980) (denial of a stay of Paragraphs 12(a) and (b) and other portions of the May 21, 1980 order); Liddell v. Board of Education, 667 F.2d 643, 651 (8th Cir. 1981) (denial of a stay of the December 19, 1980 order, requiring that the State prepare a new voluntary interdistrict plan); Liddell v. Board of Education, 667 F.2d 643, 656-59 (8th Cir. 1981) (denial of a stay of Paragraphs 12(a) and (b)); Board of Education v. Liddell, No. A-200 (Blackmun and Rehnquist, Circuit

The Eighth Circuit subsequently affirmed the District Court's order, holding, *inter alia*, that the voluntary pupil exchanges contemplated by paragraph 12(a) were a "valid part of the attempt to fashion a workable remedy within the City," Pet. App. A-15; that the consolidation of the City and suburban vocational programs contemplated by paragraph 12(b) represented an appropriate exercise of the District Court's power "to remedy a violation of the State of Missouri" in connection with the establishment and continuation of separate vocational programs, *id.*; and that there was "ample support in the record" for the conclusion that the State Defendants were "primary constitutional wrongdoers" responsible for the unlawful segregation in the St. Louis school system, Pet. App. A-23.

Following the denial of their motion for rehearing, Pet. App. A-27, the State Defendants filed a petition with this Court in June, 1981 for a writ of certiorari. The reasons advanced for granting the writ involved essentially the same contentions that the State Defendants have raised in their present petition: that the 12(a) plan for voluntary pupil exchanges is an interdistrict remedy inconsistent with the decision of this Court in *Milliken* v. *Bradley*, 418 U.S. 717 (1974); that the plan to consolidate the City and suburban vocational education programs is not supported by the evidence; and that the State Defendants have been found liable for the unlawful segregation in the St. Louis school system without notice or an opportunity to be heard. This Court denied the petition of the State Defendants on November 30, 1981. *Missouri* v. *Liddell*, 102 S.Ct. 656 (1981).

While the State Defendants' petition for a writ of certiorari was pending, the District Court held hearings

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Justices, Sept. 2, 9, 1980) (denial of a stay of all portions of the May 21, 1980 order); State of Missouri v. Board of Education, No. A-285 (U.S., April 20, 1981) (denial of a stay of Paragraphs 12(a) and (b)).

regarding the proposed plans submitted by the parties in response to paragraphs 12(a) and 12(b) of its order. On June 11, 1981, it adopted a 12(b) plan for merging the vocational education programs of the City and suburban school districts. Pet. App. A-43. This plan requires the State Defendants to bear part of the cost of implementation. The plan is identical to a proposed consent decree submitted by virtually all parties to the case, including Petitioners here. *See* Pet. App. A-121 to A-125. *See also id.* at A-129 to A-133. Although the District Court also held a hearing regarding the liability and remedial issues underlying the vocational plans, *see id.* at A-120 to A-121, the State Defendants chose to submit no evidence on the issues of either liability or remedy. The order ultimately issued by the District Court incorporated *in toto* the plan set forth in the consent decree and made only minor modifications in the proposed order that had accompanied the plan. Pet. App. A-43.

On July 2, 1981, the District Court also adopted a 12(a) plan for voluntary student exchanges between the City and suburban school districts. Pet. App. A-73. This plan includes fiscal, educational, and other incentives to encourage school districts and students to participate, but their participation is not required. The State Defendants are required to bear the cost of implementation. As of June 25, 1982, nine suburban school districts had accepted the plan and agreed to participate in it.

Following the entry of the District Court's orders implementing the 12(a) and 12(b) plans, the State Defendants once again appealed to the Eighth Circuit. On December 2, 1981, the Court of Appeals dismissed portions of the appeal on the ground that the issues presented were not appealable. *Liddell* v. *Board of Education*, No. 81-1184, slip op. at 3-4 (8th Cir., Dec. 2, 1981) (App. A at 5a). The court also held that the State

Defendants could not challenge the terms of the 12(b) consent order they themselves had proposed. *Id.*, slip op. at 5-6 (App. A at 7a). However, the Court of Appeals permitted the appeal to proceed to the extent that it challenged the requirement that the State Defendants fund the plans adopted by the District Court. On February 25, 1982, the Eighth Circuit affirmed the orders of the District Court, holding that as primary constitutional wrongdoers, the State Defendants could be required to take such action as was necessary to desegregate the City schools, even if part of that action would occur outside the City school district, so long as non-party suburban school districts were not required to participate. The Court of Appeals also held that the State Defendants could be ordered to help fund the consent decree they had proposed to remedy the interdistrict violations for which they had been found responsible in connection with the creation of racially segregated vocational education programs in the City and suburbs. The State Defendants have now asked this Court to review the December 2, 1981 and February 25, 1982 decisions of the Eighth Circuit.

SUMMARY OF ARGUMENT

Petitioners seek review essentially of two questions: first, whether the 12(a) and 12(b) plans adopted by the District Court and affirmed by the Eighth Circuit somehow violate the principles of *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*"Milliken I"*) and *Hills* v. *Gautreaux*, 425 U.S. 284 (1976); and, second, whether the finding by the courts below that the State Defendants are liable for their failure to dismantle the *de jure* racially dual school system in St. Louis deprived Petitioners of due process.

The City Board and the Caldwell Respondents submit that the Petitioners have failed to show that the decisions below conflict with any decision of another Court of Appeals or of this Court. *See* Rule 17.1(a), (c). The Petitioners' contentions to the contrary rest upon a funda-

mental misinterpretation of the orders they are challenging. Those orders reflect the application of established principles of law to the facts of the St. Louis school system, and do not present any novel issues worthy of review by this Court.

The paragraph 12(a) plan does not violate *Milliken I* because it is a wholly voluntary program of pupil transfers, which does not require the participation of any students or suburban districts. The only party required to participate is the State of Missouri. The required participation of the State is fully consistent with *Gautreaux* because the voluntary plan is intended to alleviate the segregated conditions for which the State has been found primarily responsible.

The paragraph 12(b) vocational education plan is based upon a consent decree proposed by Petitioners themselves. Even if Petitioners were free to challenge that plan, which they are not, the plan is amply supported by the evidence and findings below.

Finally, Petitioners' claim that they were deprived of due process, because they never knew anyone was contending they were liable for their *de jure* segregation within St. Louis, is simply belied by the trial record. The conclusions of the lower courts concerning Petitioners' liability are fully supported by the evidence, and the State Defendants had ample notice and opportunity to contest them.

REASONS FOR DENYING THE WRIT

1. Petitioners argue that the 12(a) plan for voluntary student exchanges between the City and suburban school districts is an "interdistrict" remedy that violates *Milliken I* because the lower courts have to date found no interdistrict constitutional violation.[5] Petitioners have

[5] Separate proceedings regarding alleged interdistrict constitutional violations and the propriety of mandatory interdistrict relief are currently pending in the District Court. All parties to this case agree that mandatory interdistrict relief would not be proper

misconstrued the 12(a) plan. That plan does not impose mandatory interdistrict desegregation. Rather, it employs noncoercive means in an effort to afford additional relief from the intradistrict segregation found to exist in the City school system. As characterized by the trial judge, the plan is "voluntary in philosophy and fact."[6] No school districts or students are required to participate, although they are encouraged to do so through a variety of incentives. No obligations or penalties are imposed upon school districts or students choosing not to participate. Thus, the conflict asserted by Petitioners between the 12(a) plan and *Milliken I* simply does not exist, because the 12(a) plan does not involve a mandatory

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absent a finding of an interdistrict violation, or an intradistrict violation with interdistrict effects, as required by *Milliken I*. *See* Stipulation of Issues for October 9, 1981 Pretrial Conference (filed Oct. 7, 1981).

[6] The District Court's July 2, 1981 Order provides in pertinent part as follows:

> These general characteristics apply to all of the following elements of the plan:
>
> A. The plan is voluntary in philosophy and fact. This point is central to this plan and distinguishes it from other alternatives. The word "voluntary" as used throughout should be understood in its usually accepted sense, specifically:
>
> No students would be required to attend any schools but those to which they would normally be assigned. The plan presents additional options and incentives for students, parents, and school districts. Every decision concerning the choice of schools and districts other than students' home schools and districts would be made by students and their parents.
>
> Participation in this plan is neither an admission of liability nor an element of proof of liability of any suburban school district in an inter-district school desegregation case.
>
> A school district's participation in this plan would be voluntary. Each school district in the St. Louis metropolitan area is encouraged to make its own independent decision whether to participate in the plan.

Pet. App. A-80 to A-81.

interdistrict remedy. In this regard, it is significant to note that none of the suburban school districts has joined the State Defendants in their Petition for a Writ of Certiorari.

The State Defendants emphasize that the 12(a) plan is not voluntary as to them, because it requires them to bear the cost of implementation. However, it was entirely within the power of the lower courts to order the State Defendants to fund such a plan as part of an intradistrict remedy. The State Defendants have been adjudicated primary constitutional violators for failing to discharge their obligation to dismantle the dual school system in St. Louis. Despite the implementation of a system-wide desegregation plan, approximately 30,000 students in St. Louis continue to attend one-race schools as a result of that constitutional violation. The State Defendants thus have no basis for challenging a requirement that they provide funds for additional remedial measures intended to reduce the segregation for which the State has been held liable.

This Court has previously recognized that *Milliken I* does not protect a constitutional violator from being ordered to implement a remedial plan that extends beyond the city in which the violation occurred, provided that suburban districts or other nonparties are not ordered to participate in the plan involuntarily. *Hills* v. *Gautreaux*, *supra*, 425 U.S. at 297-300. In *Gautreaux*, the Court rejected the contention of the Department of Housing and Urban Development ("HUD") that because the constitutional violation for which HUD was found liable had occurred within the City of Chicago, *Milliken I* precluded an order affecting HUD's conduct throughout the Chicago metropolitan area. 425 U.S. at 297. The Court found that such relief was well within the broad equity power of the federal courts to order corrective action commensurate with the constitutional violation to be remedied.

The voluntary student exchange plan adopted by the courts below is fully consistent with *Gautreaux*. The plan does not require the participation of suburban school districts or other nonparties. It simply requires the State Defendants to bear the cost of wholly voluntary interdistrict transfers intended to reduce the State-created segregation within the City school system. This Court has previously decided that a state may be required to fund the relief necessary to remedy a constitutional violation for which it has been found responsible. *Milliken* v. *Bradley*, 433 U.S. 267, 288-91 (1977) (*"Milliken II"*). *See Penick* v. *Columbus Board of Education*, 663 F.2d 24 (6th Cir. 1981); *Reed* v. *Rhodes*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982); *United States* v. *Board of School Commissioners*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980). *Milliken II* also disposed of Petitioners' contention that the principles established by *Gautreaux* apply only to cases involving housing desegregation. *See* 433 U.S. at 281-82. Petitioners' contention that this case is factually distinguishable from *Gautreaux*, apart from being without merit,[7] does not present an issue worthy of review by this Court.

2. Petitioners argue that the District Court's adoption of the 12(b) plan conflicts with the decision of this Court in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971). However, Petitioners have again misconstrued the actions of the District Court. As previously discussed, the 12(b) plan is based upon a consent decree signed by the District Court after having been submitted by virtually all parties to this case, including Petitioners. Petitioners expressly agreed to the entry of the proposed decree.[8] *Armour*, which involved the *interpretation* of a

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[7] Contrary to their contentions, the State Defendants have been found to have committed intentional segregative acts. *See* Adams v. United States, *supra*, 620 F.2d at 1280, 1287, 1291. They also clearly have the power to fund educational programs beyond the city limits of St. Louis, which is all that the 12(a) plan requires.

[8] At the hearing regarding the proposed decree held on May 21, 1981, counsel for Petitioners stated as follows:

consent decree, is simply irrelevant. This case involves only the question of whether a party that has accepted a consent decree may seek to challenge it once it has been approved by a court. The Eighth Circuit answered this question correctly in the negative, and that ruling does not warrant review by this Court. *See Clinton Street Greater Bethlehem Church* v. *City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973); *Autera* v. *Robinson*, 419 F.2d 1197, 1199-1200 (D.C. Cir. 1969).

In an attempt to escape the binding effect of the consent decree, Petitioners claim that the District Court rejected or abrogated it in adopting the 12(b) plan. Petitioners attempt to support this claim with an incomplete description of the proceedings before the trial court. In its June 11, 1981 order adopting the 12(b) plan, the District Court in fact restated and approved all of the terms of the proposed consent decree. However, because the Adams plaintiffs objected to the plan and the Liddell plaintiffs sought the inclusion of additional language in the accompanying order, the District Court also incorporated the consent decree into a separate order.[9] In addition, it included provisions concerning funding upon which all the parties had not agreed.

The actions of the District Court clearly did not constitute either rejection or abrogation of the proposed consent decree. The court did not alter the specific opera-

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> We have consented to the plan and that's one point I want to make. Mr. Dierker might have suggested we were holding out on the funding also. We have not, your honor. We have consented to the plan that is submitted to the Court. We have signed the Consent Decree, so we are unlike the City [Board], who has not, at this point in time.

Transcript of Proceedings, at 82 (May 21, 1982).

[9] In appropriate circumstances, an order of a court may properly be treated as an adjudicated judgment as to one party and a consent decree as to another party. Equal Employment Opportunity Commission v. United Airlines, Inc., 560 F.2d 224, 229 n.7 (7th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

tional terms of the proposed decree, which remained binding upon the parties who had agreed to them. The court simply reentered the plan and consent decree in the form of an order. There is ample authority to support the District Court's approach. *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330, 1334-1335 (5th Cir. 1979); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1174-75 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).[10] Thus, the Eighth Circuit correctly held that, having agreed to the proposed decree, the State Defendants are now bound by its provisions. The State Defendants' appeal to the Eighth Circuit and their Petition to this Court represent an effort to renege on their prior commitments. This effort should be summarily rejected.

In an attempt to create an issue worthy of review by this Court, Petitioners argue that the District Court and the Court of Appeals incorrectly applied an "affirmative duty" standard to the State and the Special School District of St. Louis County (hereinafter "Special District") in ordering a vocational education remedy. The apparent basis for this argument is that the Special District was established after 1954 and thus was not part of the dual system formerly mandated by the Missouri Constitution and state statute. Once again, however, Petitioners erroneously construe the findings of the District Court and ignore established principles of desegregation law.

In affirming the finding of a constitutional violation by the State Defendants with respect to vocational education, the Eighth Circuit stated as follows:

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[10] In *Pettway*, the court held that a class action settlement and a court decree approving it were partly consensual and partly judgmental. One of the determining factors was that the district court had couched some findings in language more appropriate to evaluating a settlement, while characterizing other findings as the judgment of the court. 576 F.2d at 1174-75. *See also* Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975).

> The district court specifically found that the State of Missouri's establishment and maintenance of the separate Special District for vocational education was 'part and parcel of its failure to take affirmative steps to eradicate root and branch the dual system it once formally mandated.' 491 F. Supp. at 358. Section (b), therefore, was designed to remedy a violation of the State of Missouri.

Liddell v. *Board of Education*, 667 F.2d 643, 651 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 656 (1981). There is ample support in the record for the conclusion that the State intentionally created and maintained the Special District as a separate, segregated entity apart from the City Board's vocational programs. The State not only enacted legislation permitting the Special District to seek area vocational school ("AVS") status, but designated the Special District as an AVS without any requirement that the City Board be included in its service area. Similarly, two years later, the State provided the City Board with a separate designation rather than requiring that it be included in a combined service area with the Special District. The obvious and intended result of that designaiton was the creation of two segregated systems, one with a predominantly white student enrollment, the other predominantly black.

Each system has become entrenched since its AVS designation, in no small part due to the additional funding provided as a result of the designation. Thus, the effect of designating the Special District as an AVS has been to increase and intensify the segregated condition existing in the City and between the City and St. Louis County. In short, the State clearly did not discharge its obligation to dismantle the former *de jure* racially dual system by creating and maintaining separate vocational education systems. In view of its finding of liability on the part of the State for the unlawful segregation in the vocational education systems, the District Court clearly had the power to direct the State to fund the

remedy for that constitutional violation, whether or not such action was within the terms of the consent decree proposed by Petitioners. The District Court's June 11, 1981 order thus does not merit further review.

Implementation of the vocational education desegregation plan adopted by the District Court began in September, 1981. The process has been difficult, but the City Board and others have worked diligently to achieve successful implementation and to lay the groundwork for further desegregation in future years. Significantly, no student, parent, or employee group is asking the Court to review the matter at this time. Nor have the two affected school districts sought review. The grant of a writ of certiorari now would only cause uncertainty and concern on the part of the community and the parties at a time when all thoughts and efforts would better be directed toward the successful implementation of the plan. Apart from the absence of any issues worthy of review, this practical consideration strongly suggests that this Court should not exercise its discretion to grant review.

3. Petitioners contend finally that they have been denied procedural due process in connection with the determination of their liability for the existence of an unlawful dual school system in St. Louis. The numerous opinions of the District Court and the Eighth Circuit amply summarize the evidence supporting this determination, including the fact that the Missouri Constitution and state statutes formerly required a racially dual school system, and that despite the decision of this Court in *Brown* v. *Board of Education*, *supra*, the State Defendants failed to take action to eliminate the vestiges of the racial discrimination they had imposed.[11] *See*, *e.g.*, *Liddell* v. *Board of Education*, *supra*, 491 F. Supp. at 357-

[11] The Missouri statutes requiring segregation in the public schools were not actually repealed until 1957. The provisions of the Missouri Constitution requiring such segregation were not repealed until 1976.

60. These facts fully justify the conclusion of the lower courts that the State Defendants failed to discharge their affirmative obligation to dismantle the dual school system in St. Louis, and that they are therefore liable for the costs of remedying that constitutional violation. *See Milliken II*, *supra*, 433 U.S. at 288-91; *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958); *Penick* v. *Columbus Board of Education*, *supra*; *Reed* v. *Rhodes*, *supra*; *United States* v. *Board of School Commissioners*, *supra*.

Petitioners assert that they were not afforded notice of, or an opportunity to respond to, the charges against them, and they ask this Court to exercise its supervisory power to correct this alleged denial of due process by ordering a new trial. There is no merit to Petitioners' due process argument. The record below demonstrates that the State was joined as a defendant on July 13, 1977, while the trial did not begin until October 17, 1978, and that at the trial the State contested its liability.[12] The 1977 motions seeking to add the State Defendants as parties, together with the supporting memoranda, provided notice of the allegations against Petitioners. Indeed, in its March 3, 1980 decision finding the State Defendants liable for the existence of an unlawful dual school system in St. Louis, the Eighth Circuit noted that during the trial, "[t]he State argued that there had been no violation but that, in any event, it was not responsible and should not be made to participate in any remedy." *Adams* v. *United States*, *supra*, 620 F.2d at 1283. Furthermore, the State participated in hearings

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[12] Fed. R. Civ. P. 15(b) provides in pertinent part as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

before the District Court in May, 1980 that resulted in additional findings of fact and conclusions of law relating to the State's liability. Because the State participated fully in the proceedings below and was obviously aware that its liability was at issue, the determination of such liability by the lower courts does not suggest any departure whatsoever from the accepted and usual course of judicial proceedings. *See Equal Employment Opportunity Commission* v. *Local 638*, 401 F. Supp. 467, 471 (S.D. N.Y. 1975) (establishment at trial of specific acts of discrimination by defendant against which no such acts were alleged in the complaint was sufficient to support determination of liability), *modified on other grounds and affirmed*, 532 F.2d 821 (2d Cir. 1976). Given the evidence supporting the findings of the lower courts, and the full participation by Petitioners in the trial proceedings, this case presents no due process issue worthy of consideration by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CRATON LIDDELL, *et al.*,

and

EARLINE CALDWELL, *et al.*,

CITY OF ST. LOUIS,

JANICE ADAMS, *et al.*,

and

MARY PULEO, *et al.*,

UNITED STATES OF AMERICA,

Appellees,

vs.

BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, *et al.*,

and

STATE OF MISSOURI, *et al.*,

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY,

ST. LOUIS COUNTY, *et al.*,

and

AFFTON SCHOOL DISTRICT, *et al.*,

Appellants.

No. 81-1184

State of Missouri and Officials

No. 81-1828

Adams Group

No. 81-1834

Special School District of St. Louis County

No. 81-1835

State of Missouri and Officials

No. 81-1940

State of Missouri and Officials

No. 81-2003

St. Louis City Board of Education

No. 81-2042

Caldwell Group

No. 81-2043

St. Louis Board of Education

No. 81-2085

Liddell Group

No. 81-2086

Riverview Gardens School District

No. 81-2127

Hazelwood School District

No. 81-2134

St. Louis County Government Officials

No. 81-2135

Mehlville Board of Education

No. 81-2136

Lindbergh and Affton School Districts

No. 81-2137

Rockwood Board of Education

No. 81-2138

Webster Groves Board of Education

No. 81-2139

Parkway School District

No. 81-2140

Ladue School District

Appeals from the United States District Court
for the Eastern District of Missouri

Filed: December 2, 1981

Before HEANEY, BRIGHT and STEPHENSON, *Circuit Judges.*

ORDER

Eighteen appeals are presently pending in this Court which raise issues related to the St. Louis public school desegregation lawsuit.[1] For the reasons which follow, we dismiss several of the appeals for lack of jurisdiction,

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[1] The St. Louis public school desegregation case has been before us on three prior occasions. *See Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735 (8th Cir. Feb. 13, 1981); *Adams v. United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980); *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

allow some to proceed with a reservation of the jurisdictional issues and allow others to proceed without specific reservation of jurisdictional issues. Each appeal will be considered individually or in subject matter groupings by reference to docket number.

In analyzing these appeals, we are mindful that "the line between appealable and nonappealable orders is rarely clear in a case in which the district court retains jurisdiction over a developing desegregation plan * * *." *Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 18 and 18 n.5 (8th Cir. Feb. 13, 1981). Many of the appealability questions are "not free from doubt," *id.* at 18 n.5, but we will decide them within the letter and spirit of the applicable law. *See generally School District of Kansas City v. Missouri*, 592 F.2d 493 (8th Cir. 1979) (per curiam). The basic premise underlying our analysis is that our jurisdiction is normally confined to the review of final orders, 28 U.S.C. § 1291, or to the classes of interlocutory orders described in 28 U.S.C. § 1292(a). *Hoots v. Pennsylvania*, 587 F.2d 1340, 1346 (3d Cir. 1978). With these general principles in mind, we turn to the jurisdictional questions related to these appeals.

A. *No. 81-1184*

In this appeal docketed on February 20, 1981, the state defendants [2] appeal from Judge Meredith's [3] December 19,

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[2] "The 'State Defendants' include the State of Missouri and its Board of Education, as well as the following Missouri officials: the Governor, the Attorney General, the Treasurer, the Commissioner of Education, the Commissioner of Administration, and the individual members of the Missouri Board of Education." *Liddell v. Board of Education, Nos.* 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 13 n.2 (8th Cir. Feb. 13, 1981).

[3] The Honorable James H. Meredith, now United States Senior District Judge for the Eastern District of Missouri, presided in the St. Louis public school desegregation case until December of 1980, when it was assigned to the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

1980, order which required them to submit a new plan of voluntary and cooperative desegregation on or before February 2, 1981, and to submit a further report on March 2, 1981.

A district court order requiring submission of a plan, without more, is not appealable.[4] *See Morrissey v. Curran*, 650 F.2d 1267, 1285-1286 n.17 (2d Cir. 1981); *Spates v. Manson*, 619 F.2d 204, 208-211 (2d Cir. 1980). This general rule of nonappealability is equally applicable to district court orders which merely require preparation and submission of school desegregation plans. *See, e.g., Hoots v. Pennsylvania, supra*, 587 F.2d 1348-1351; *Bradley v. Milliken*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972); *Taylor v. Board of Education*, 288 F.2d 600 (2d Cir. 1961).

Moreover, this Court has twice before approved the district court's paragraph 12(a) order which required the state defendants to make every possible effort to work out a voluntary plan of interdistrict pupil exchanges for the 1980-1981 school year. *See Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 19 (8th Cir. Feb. 13, 1981); *Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 17 (8th Cir. Mar. 19, 1981) (order).

For the above reasons, No. 81-1184 is dismissed.

B. *Nos. 81-1828, 81-1834 and 81-1835*

In No. 81-1828, the Adams plaintiffs-intervenors[5] question "whether a joint plan conforms with this court's

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[4] Even though the district court's December 19, 1980, order specifies that certain information must be contained in the plans, we nevertheless conclude that this order cannot be appealed.

[5] The Adams plaintiffs-intervenors consist of a white parents group which represents the Concerned Parents for Neighborhood Schools. *E.g., Adams v. United States*, 620 F.2d 1277, 1283 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980).

[the Eighth Circuit] Order for a merger of programs for vocational education." The Adams plaintiffs basically challenge the district court's June 11 and 12 orders which approved and ordered to be implemented a "purported" merger of programs operated by the Special District of St. Louis County and the St. Louis City School District.

In No. 81-1834, the Special School District of St. Louis County (SSD) appeals from its mandatory inclusion in an interdistrict plan as a result of the district court's orders of June 11, 1981, May 21, 1980 (as amended) and the June 3, 1980, district court findings of fact and conclusions of law. The SSD also challenges the September 12, 1980, district court order which added it as a party defendant.[6]

In No. 81-1835, the state defendants appeal from the district court's June 11, 1981, order which adopted a plan to desegregate vocational education in the City of St. Louis and St. Louis County. Specifically, the state defendants contend that the district court's June 11, 1981, order erroneously approved a 12(b) vocational plan[7] because: (1) "there was not sufficient record or evidence to support such an order or remedy;" and (2) "there was not sufficient record or evidence to support an order that State Defendants *fund* such a 12(b) vocational plan." (Emphasis added.)

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[6] The portion of the district court's order which added the SSD as a party defendant is not appealable. *See, e.g., Prop-Jets, Inc. v. Chandler*, 575 F.2d 1322, 1325 (10th Cir. 1978).

[7] Paragraph 12(b) of an earlier district court order, which has been approved by this Court, directed the state defendants and the St. Louis City Board of Education

> [t]o develop and submit to the Court * * * a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis County and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

Liddell v. Board of Education, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 16 (8th Cir. Mar. 19, 1981) (order).

The district court's June 11, 1981, order adopted, and ordered to be implemented, a 12(b) plan pursuant to a consent decree which had been endorsed by all parties except the Adams group. Therefore, the Adams group may challenge the 12(b) plan adopted by the district court. However, the SSD and the state defendants cannot challenge the 12(b) plan because they entered into the underlying consent decree. *See generally Strouse v. J. Kinson Cook, Inc.*, 634 F.2d 883, 884 n.1 (5th Cir. 1981) (per curiam); *Amstar Corp. v. Southern Pacific Transport Co.*, 607 F.2d 1100 (5th Cir. 1979) (per curiam), *cert. denied*, 449 U.S. 924 (1980).

In short, we permit No. 81-1828 to proceed. We dismiss Nos. 81-1834 and 81-1835 because we believe they are not appealable. Counsel for the appellants in those cases may, if they wish, argue in support of the consent decree and the state of Missouri may argue whether the financial obligations imposed upon it with respect to the vocational education plan are inconsistent with our previous mandates.

C. *Nos. 81-1940 and 81-2003*

In No. 81-1940, the state defendants challenge: (1) the district court's order (H(225)81)[8] which approved the desegregation budget for 1981-1982 proposed by the defendant St. Louis City Board of Education; and (2) the district court's order (H(226)81), entitled "An Educational Plan for Voluntary, Cooperative Desegregation of Schools in the St. Louis, Missouri Metropolitan Area," which approved a plan for voluntary transfer of students pursuant to paragraph 12(a) of the court's May 21, 1980, order.

In No. 81-2003, the St. Louis City Board of Education challenges the district court's: (1) July 14, 1981, order

[8] For convenience, we will occasionally utilize the numerical designations which the district court has used for its various orders in this case.

(H(237)81) which denied the City Board's motion to compel the state defendants to pay the state's full share of the 1980-1981 desegregation budget; (2) August 5, 1981, order (H(294)81) which denied the City Board's request for a hearing and a motion for reconsideration of the district court's July 14, 1981, order; and (3) August 5, 1981, order (H(301)81) which denied the supplemental motion of the Board of Education of the City of St. Louis to compel the state defendants to pay the state's full share of the 1980-1981 desegregation budget. These district court funding orders basically concluded that the state's payment share for the 1980-1981 desegregation budget "does not include payments for certain expenditures which had been offset by contributions from private foundations and public agencies * * *."

We conclude that the challenged orders in these appeals are presently appealable because they amount to mandatory injunctions under 28 U.S.C. § 1292(a)(1). We accordingly consolidate them and allow them to proceed in accordance with the schedule specified by our Clerk of Court. We emphasize, however, that the state defendants' obligation to fund one-half of the actual costs of implementing desegregation programs for the St. Louis school system has been established by this Court. *See Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 29 (8th Cir. Feb. 13, 1981). Therefore, our review of the state defendants' fiscal obligations for desegregation costs is limited solely to the issue of what numerical figure constitutes one-half of the actual costs of integrating the St. Louis school system.

D. *Remaining Appeals (Nos. 81-2042, 81-2043, 81-2085, 81-2086, 81-2127, 81-2134, 81-2135, 81-2136, 81-2137, 81-2138, 81-2139* and *81-2140)*

The remaining appeals essentially focus on three district court orders:

(1) H(337)81, entered on August 24, 1981, which, most significantly: (a) added eighteen St. Louis County school districts[9] as parties; (b) added, sua sponte, three St. Louis County governmental officials as party defendants—County Executive Gene McNary, County Treasurer Harlow Richardson and Collector of St. Louis County Contract Account George C. Leachman, and (c) ordered the state defendants, the United States[10] and the St. Louis City Board of Education to develop and submit, by February 1, 1982, a suggested plan of interdistrict school desegregation for St. Louis City and St. Louis County.[11]

This Court previously approved paragraphs 12(a)-(c) of the May 21, 1980, district court order, both as originally entered, *Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735 (8th Cir. Feb. 13, 1981), and as subsequently amended, *Liddell v. Board of Education*, Nos. 80-1458, 80-1494, 80-1531, 80-1599 and 80-1735, slip op. at 11, 13-17 (8th Cir. Mar. 19, 1981) (order). Paragraphs 12(a)-(c) are fully set forth in our March 19, 1981, order, *supra*, slip op. 14-17. We doubt whether we can or should permit the validity or scope of paragraph 12(c), which essentially requires the development and submission of proposed interdistrict

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[9] Affton, Bayless, Brentwood, Hancock Place, Hazelwood, Jennings, Ladue, Lindbergh, Maplewood-Richmond Heights, Mehlville, Normandy, Parkway, Pattonville, Riverview, Rockwood, Valley Park, Webster Groves and Wellston.

[10] The district court subsequently excused the United States from any obligation to develop and submit any suggested plan of interdistrict school desegregation.

[11] We note parenthetically that on Monday, November 16, 1981, the district court received four interdistrict desegregation feasibility plans which were prepared by the state defendants, the St. Louis City Board of Education and the court-appointed experts. The district court apparently views these plans as preliminary to the final interdistrict feasibility plans which must be submitted by February 1, 1982.

desegregation plans, to be reargued. Nevertheless, reserving the jurisdictional questions and making clear that we have not withdrawn or modified paragraph 12 (c), we will permit the parties to brief and argue the question.

(2) H (493)81, entered on September 24, 1981, which granted the Adams plaintiffs' motion to sever the amended, supplemental and cross-complaints of the defendant St. Louis City Board of Education and Caldwell plaintiffs (filings H(348)81 and H(351)81). The severed claims essentially relate to the potential interdistrict liability issues concerning the newly added defendants specified in H(337)81. We again doubt whether this order is presently appealable. *See* 9 Moore's FEDERAL PRACTICE ¶ 110.13[8] p.183 (1980). Nevertheless, and again reserving the jurisdictional questions, we will allow the various challenges to this order to proceed.

(3) H(494)81, entered on September 24, 1981, in which the district court: (a) refused to recuse itself as to the issues raised in the original suit; but (b) recused itself as to the potential future findings of interdistrict liability raised in the amended, supplemental and cross-complaints of the defendant City Board and the Caldwell plaintiffs.

Because we conclude that the various appeals from H(494)81 arguably fall within our appellate jurisdiction,[12] we will allow the various challenges to it to proceed, but we reserve ruling on the jurisdictional issues until after briefing and oral argument.

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[12] We direct the parties challenging H(494)81 to brief the jurisdictional issue in light of the following relevant decisions: *Hampton v. Chicago*, 643 F.2d 478 (7th Cir. 1981) (per curiam); *Scarrella v. Midwest Federal Savings & Loan*, 536 F.2d 1207 (8th Cir.) (per curiam), *cert. denied*, 429 U.S. 885 (1976); *Donaldson v. Pillsbury Co.*, 529 F.2d 979 (8th Cir. 1976) (per curiam); and *Kelley v. Metropolitan County Board of Education*, 479 F.2d 810 (6th Cir. 1973) (order).

We have carefully examined the remaining district court orders which are challenged in this final grouping of appeals and conclude that we lack jurisdiction to entertain them because they are nonfinal under 28 U.S.C. § 1291, nonappealable under 28 U.S.C. § 1292(a) and nonappealable even under the collateral order doctrine. *See generally School District of Kansas City v. Missouri, supra*, 592 F.2d at 496. Our reasons for dismissing the challenges to the remaining district court orders at issue are, quite briefly, with reference to each separate appeal as follows:

(a) *81-2042*

In this appeal, the Caldwell plaintiffs-intervenors challenge eight district court orders: (1) H(336)81;[18] (2) H(337)81; (3) H(341)81; (4) H(476)81; (5) H(409)81; (6) H(410)81; (7) H(493)81; and (8) H(494)81. As previously discussed, we will entertain the various challenges to H(337)81, H(493)81 and H(494)81, but will reserve ruling on the jurisdictional issues relating to those orders. The remaining orders challenged by the Caldwell group are not presently appealable and, therefore, will not be reviewed.

(b) *81-2043*

In this appeal, the St. Louis City Board of Education challenges H(337)81, H(410)81, H(493)81 and H(494)81. Only the claims relating to H(337)81, H(493)81 and H(494)81 are allowed to proceed.

(c) *81-2085*

In this appeal, the Liddell plaintiffs appeal from the district court's September 25, 1981, order (H(423)81)

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[18] In H(336)81, the district court ordered implementation of the voluntary interdistrict desegregation plan as a pilot project. That order applied only to those St. Louis County school districts which elected to participate in the voluntary interdistrict plan. We conclude H(336)81 is not presently appealable because of its limited and voluntary nature.

which denied their motion to amend the original complaint of the original Liddell plaintiffs. We conclude that we lack jurisdiction to entertain this claim and accordingly dismiss 81-2085. *See, e.g., McClure v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *Wells v. South Main Bank*, 532 F.2d 1005, 1006 (5th Cir. 1976) (per curiam).

(d) *81-2086*

In this appeal, the School District of Riverview Gardens appeals from H(337)81, H(492)81 and H(494)81. As discussed *supra*, only the challenges relating to H(337)81 and H(494)81 will be allowed to proceed.

(e) *81-2127*

The Hazelwood School District appeals from H(337)81, H(492)81, H(494)81 and H(540)81. Only the challenges to H(337)81 and H(494)81 will be considered.

(f) *81-2134*

In this appeal, the St. Louis County Governmental Officials [14] challenge H(337)81 and H(494)81. These challenges may proceed.

(g) *81-2135*

The Mehlville Board of Education appeals from H(337)81, H(492)81, H(494)81 and H(540)81. As previously discussed, only H(337)81 and H(494)81 are presently appealable.

(h) *81-2136*

The Lindbergh and Affton School Districts appeal from H(337)81, H(492)81 and H(494)81. As discussed above, only the claims relating to H(337)81 and H(494)81 will be allowed to proceed.

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[14] The St. Louis County Governmental Officials-appellants consist of County Executive Gene McNary, County Treasurer Harlow Richardson and Collector of St. Louis County Contract Account George C. Leachman.

(i) *81-2137*

The Rockwood Board of Education appeals from the district court's order designated as H(337)81. Its challenge to this order, for the reasons previously discussed, may proceed.

(j) *81-2138*

The Webster Groves Board of Education appeals from the district court's order designated as H(337)81. Its challenge may proceed.

(k) *81-2139*

The Parkway School District challenges H(337)81, H(493)81 and H(494)81. These claims will be considered.

(l) *81-2140*

The Ladue School District challenges H(337)81 which joined it as a party defendant and H(494)81 regarding a potential interdistrict remedy. For the reasons previously discussed, the claims relating to H(337)81 may proceed. To the extent that the Ladue School District challenges the portion of H(494)81 relating to the preparation and submission of interdistrict desegregation plans, its claims are dismissed. Only the recusal issues in H(494)81 may be challenged at this time.

REMAINING ISSUES:

Several additional matters remain for disposition. First, as our Clerk of Court orally informed the attending parties at an appeal organizational meeting on November 2, 1981, this Court denies the various requests for en banc consideration of these appeals. We will consider the appeals over which we have jurisdiction on January 11, 1982. The Court appreciates the efforts of those attorneys who elected to meet and cooperate with our Clerk of Court in order to consolidate the issues and limit briefing.

Second, the motion of certain parties seeking permission for limited intervention on appeal is granted only insofar as their request is related to district court orders which we have found appealable or permitted to proceed at this time.

Third, we have refrained from discussing various portions of the district court orders underlying these appeals. For example, we have not addressed orders which stayed certain proceedings pending before it for the reason that they are not appealable. *See, e.g., Castanho v. Jackson Marine, Inc.*, 650 F.2d 546, 548-549 (5th Cir. 1981) (per curiam). The district court must retain day-to-day management of this complex case.

Finally, the Riverview Gardens School District moves this Court, purportedly pursuant to Fed.R.App.P. 46(c) and old 8th Circuit Rule 15 (now 8th Circuit Rule 22), to disqualify the St. Louis law firm of Lashly, Caruthers, Thies, Rava and Hamel from representing the St. Louis City Board of Education against Riverview Gardens in this litigation. We deny the motion as being without merit.

CONCLUSION:

The parties in this case are admonished to avoid filing premature and piecemeal interlocutory appeals which have no jurisdictional basis. We have repeatedly stressed the clear duty of the St. Louis City Board of Education and the state defendants to comply with the district court's final remedial orders as approved by this Court. The City Board and state defendants must provide integrative opportunities for pupils in all-black schools and take all appropriate steps to insure a quality education in those schools. Voluntary integrative participation should be encouraged. The district court's orders which ordered submission of interdistrict desegregation feasibility plans are independent from, and thus cannot provide the basis for any delay in the implementation of,

the desegregation remedies previously approved by this Court. We order prompt compliance with our mandate.

Finally, we take this opportunity to thank those attorneys who attended the two organizational meetings relating to these appeals which were organized by our Clerk of Court. The Court appreciates counsels' efforts to cooperate in the limitation of issues and consolidation of briefs. We also realize that this order will require adjustments in the various briefs which have been or will be submitted. However, we are certain that counsel will make necessary adjustments in the same cooperative spirit which, our Clerk of Court informs us, was evidenced at the two organizational meetings relating to these multiple appeals.

The appeals are directed to proceed or are dismissed in accordance with our discussion above.

So ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

The full text of paragraph 12(a)-(b) of the District Court's May 21, 1980 order, as amended, is as follows:

12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:

a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchange which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by December 15, 1980.

The State defendants, the United States, and the St. Louis Board of Education are ordered to develop a closer and more efficient cooperation among themselves for the pursuit of the objective hereof. In particular, they are directed to establish close liaison procedures and prepare concrete and specific proposals involving the county school districts and evaluate all other reasonable proposals, including any from county districts, and intensify their joint efforts. While the results disclosed in the Updating Report of the St. Louis Board of Education of September 11, 1980 are encouraging and represent some tangible achievements, a great deal more should be accomplished.

One of the subjects to be considered for voluntary cooperation between the City and the suburban school districts shall be the study of the feasibility of establishing magnet schools located

in suburban districts with attendance open to students of both the suburbs and the City. Consideration may be given to the expansion beyond the boundaries of St. Louis County into St. Charles and Jefferson Counties subject to limits of distance and practicality. The location of these magnet schools should be determined by agreement between the St. Louis Board of Education and the suburban school districts involved. The State and the St. Louis Board of Education will investigate the availability of funding for this program. A joint report on the status and results including the availability of technical assistance and funding of this effort should be given to the Court by the United States, the State defendants, and the St. Louis Board of Education on December 15, 1980.

Pursuant to [this] paragraph * * *, the State of Missouri and particularly the State Board of Education and the Commissioner of Education of the State of Missouri shall submit a new plan of voluntary and cooperative desegregation on or before February 2, 198* The plan shall encompass each district within St. Louis County. Jefferson and St. Charles Counties shall also be included for use of magnet schools to be located in St. Louis City and County.

The State of Missouri shall report back to the Court on March 2, 1981 as to those districts in St. Louis County, Jefferson and St. Charles Counties that are willing to participate in the plan and those that are not willing to participate in the plan. The report of March 2, 1981 shall include the number of students that each district is willing to receive and those that they desire to send outside of their district, either to magnet schools in the County or in

the City of St. Louis, including the race and grade of those students.

b) To develop and submit to the Court by December 15, 1980, a plan for the consolidation or merger and full desegregation of the separate vocational educational programs operated by the Special District of St. Louis and the school district of the City of St. Louis, for implementation in the 1981-82 school year.

Brief for the United States

FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2022

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MISSOURI, ET AL., PETITIONERS

v.

CRATON LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in refusing to reconsider the imposition of certain obligations on petitioners.

2. Whether the court of appeals erred in finding that the district court's order of June 11, 1981, essentially adopted a consent decree agreed to by petitioners.

3. Whether petitioners, who have been parties to this litigation for five years, have been denied notice of any allegations against them and an opportunity to be heard during that period.

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OPINIONS BELOW

The district court opinion of April 12, 1979, is reported at 469 F. Supp. 1304. The court of appeals opinion of March 3, 1980, is reported at 620 F. 2d 1277. The order and opinion of the district court on remand (May 21 and June 3, 1980) are reported at 491 F. Supp. 351. The court of appeals opinion of February 13, 1981 (Pet. App. A-1 to A-25), and the opinion of that court denying rehearing and a stay (March 19, 1981) (Pet. App. A-27 to A-41) are reported at 667 F. 2d 643. The district court's orders of June 11, 1981 (Pet. App. A-43 to A-71) and July 2, 1981 (Pet. App. A-73 to A-108) are unpublished. The court of appeals order of December 2, 1981 (St. Louis Board of Education Br. in Opp. App. 1a-15a) and its opinion of February 25, 1982 (Pet. App. A-109 to A-147) are unpublished.

JURISDICTION

Petitioners seek review of two court of appeals judgments, one entered on December 2, 1981 (St. Louis Board of Education Br. in Op. App. 1a-15a), and one entered on February 25, 1982 (Pet. App. A-109 to A-147). On February 23, 1982, Justice Blackmun granted an application to extend the time for filing the petition to and including May 1, 1982. The petition was filed on April 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The early history of this school desegregation case is summarized in our brief in opposition in *State of Missouri* v. *Liddell*, cert. denied, No. 80-2152 (Nov. 30, 1981). In brief, the Liddell group of black children and their parents entered into a consent decree with officials of the St. Louis, Missouri, school district in December 1975. The Caldwell group of black students and parents, the NAACP, and the United States intervened in opposition to the decree, and the Adams group of white students and parents intervened in support of it;[1] the state defendants were joined in July 1977. Following a full trial on the merits of the consent decree, the district court concluded that although the St. Louis school system had operated as part of a de jure state segregated system until 1975, it had subsequently become unitary (469 F. Supp. at 1311, 1313-1314). The court of appeals reversed and remanded for remedial proceedings (*Adams* v. *United States*, 620 F. 2d 1277, cert. denied, 449 U.S. 826 (1980)), directing the district court to have the parties develop a remedial program sharing the costs of desegregation and enlisting the voluntary cooperation of the surburban school districts. On remand, on May 21,

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[1]The Adams group were dismissed on their motion on March 1, 1982.

1980, the district court adopted an intra-district desegregation plan for St. Louis and, shortly thereafter, entered supplemental findings and conclusions (491 F. Supp. 351).

In addition, Paragraph 12 of the district court's May 21, 1980, order directed petitioners, the United States and the St. Louis Board of Education to develop: (a) a voluntary, cooperative plan of pupil exchanges between St. Louis and the county school districts; (b) a plan for consolidating the vocational programs operated by the city and the county Special School District; and (c) a study and plan for eventual eradication of any vestiges of state-imposed interdistrict segregation (491 F. Supp. at 353).[2] Several parties, including petitioners, appealed from the district court's remedial order of May 21, 1980.

While those appeals were pending, the district court considered plans which were submitted pursuant to paragraphs 12(a) and 12(b) of its May 21, 1980, order. On June 11, 1981, the court entered an order (Pet. App. A-43 to A-71) consolidating the city and county vocational education systems (as contemplated by paragraph 12(b)). The order incorporated all of the essential features of a consent decree (Pet. App. A-179 to A-185) which the petitioners and several other parties to the litigation had previously signed and submitted to the court for approval; it adopted verbatim the vocational education desegregation plan which was part of that consent decree. The order also included certain funding provisions which the district court had included in a previous order after efforts to obtain an agreement between the

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[2]The complete text of paragraphs 12(a) through 12(c), as amended by subsequent orders of the district court, appears at 667 F. 2d at 657-658. The amending orders of September 17 and December 19, 1980, appear at Pet. Apps. A-149 to A-152 and A-153 to A-154. Proceedings regarding the implementation of paragraph 12(c) are presently pending in the district court. That part of the order is not involved in this petition.

St. Louis Board and petitioners had failed. On July 2, 1981, the court approved a voluntary inter-district student transfer plan (submitted pursuant to paragraph 12(a) of the May 21 order) which permitted student exchanges between participating suburban school districts and the city (Pet. App. A-73 to A-108).[3] The state parties and others noted appeals from the orders approving the 12(a) and 12(b) plans.

Meanwhile, on February 13, 1981, the court of appeals had affirmed the district court's May 21, 1980, order.[4] The court held that it had, on the *Adams* appeal, reversed the district court's nonliability finding as to all the defendants, thereby requiring (or at least permitting) the district court to find the State responsible for St. Louis' dual system (667 F. 2d at 654). With ample support in the record, the court held, it was correct for the district court to find on remand that the State parties were " 'primary constitutional wrongdoers' " (*id.* at 655), and to order them to pay half the costs of desegregation (*ibid.*). The court of appeals also held that

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[3]The district court also granted motions by the Caldwell group to add the Special School District and additional state officials as defendants. The Caldwell group was also granted leave to amend its complaint to conform to the evidence in the case (Order of June 27, 1980).

In January 1981, the St. Louis Board and the Caldwell group also moved to amend their complaints to join certain suburban school districts as additional defendants, to allege inter-district violations, and to request compulsory, as opposed to merely voluntary, inter-district relief. These motions were granted as to eighteen suburban school districts (Order of Aug. 24, 1981) (Pet. App. A-133).

[4]On December 2, 1981, the court of appeals considered the status of the 18 remaining appeals in this lawsuit. It dismissed the State parties' appeal from the June 11 order to the extent that it challenged the consent decree to which they had agreed; they were permitted to challenge the funding provisions (St. Louis Board of Education Br. in Op. App. 6a-7a). The court of appeals also concluded that the July 2 order was appealable because it "amount[s] to [a] mandatory injunction[] under 28 U.S.C. 1292(a)(1)" (*id.* at 8a). The other appeals considered in the December 2 order are not relevant to the issues raised by this petition.

the district court had the power to order all three sub-parts of paragraph 12, and did not abuse its discretion in doing so (*id.* at 650-651). A petition for a writ of certiorari (No. 80-2152) filed by the State parties (the present petitioners) was denied on November 30, 1981.[5]

On February 25, 1982, the court of appeals affirmed the district court's orders approving the voluntary inter-district student transfer plan (the 12(a) plan) and the vocational education desegregation plan (the 12(b) plan) (Pet. App. A-109 to A-147). The court of appeals refused to reconsider the adequacy of the factual and legal basis for requiring petitioners' participation in these plans.[6] It noted that it had "held in *Adams* that the state had substantially contributed to the segregation of the public schools of the City of St. Louis" and that it had "specifically sustained the validity of paragraph 12(a) of the district court's order of May 21, 1980, in our February 13, 1981, decision" (Pet. App. A-113 to A-114). It affirmed the district court's order on this basis.

The court of appeals treated the consent decree and funding provisions of the 12(b) plan separately.[7] The court

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[5]That petition argued, *inter alia*, that (1) the district court lacked authority to enter paragraph 12(a) of its order of May 21, 1980, absent a finding of an inter-district violation (80-2152 Pet. 20-24); (2) the district court lacked authority to enter paragraph 12(b) of that order because such relief was premised on an erroneous finding regarding the State's ability to merge the county and city vocational education systems and because petitioners lacked notice of any allegation of an inter-district violation (*id.* at 24-27); (3) petitioners were not precluded from raising this issue by entry of a consent decree because the district court did not approve the decree (80-2152 Supp. Br. 4-5); and (4) the district court's finding that petitioners were jointly liable for school segregation within St. Louis denied them procedural due process (Pet. 12-14).

[6]Petitioners have not challenged any specific features of the 12(a) or 12(b) plans, either in the court of appeals or in this Court.

[7]Funding had been treated as a separate issue during negotiations on the terms of the consent decree and vocational education plan (*id.* at A-129 n.25).

explained that it had carefully reviewed the decree and compared it with the June 11, 1981, order and concluded "that the latter order adopted the consent decree without significant modification" (Pet. App. A-124). It held that the parties, including the State parties, who had endorsed the consent decree could not challenge that part of the June 11, 1981, order which incorporated the consent decree.

The court of appeals did allow the petitioners to "argue whether the financial obligations imposed upon [them] with respect to the vocational education plan are inconsistent with our previous mandates" (Pet. App. A-124) because the petitioners had not consented to the funding portion of the June 11, 1981, order. But the court of appeals refused to re-examine the district court's May 1980 "finding that the state was constitutionally culpable for failing to disestablish the dual vocational education systems in the city and county" because it had affirmed that finding a year before and was bound by the doctrine of the law of the case (*id.* at A-128). It rejected the State parties' contention that this finding was not an adjudication of inter-district liability, and concluded that it provided a sufficient basis for requiring the State parties to share the cost of the 12(b) plan (*id.* at A-132).

ARGUMENT

1. The court of appeals properly refused to reconsider the adequacy of the factual and legal basis for requiring petitioners to participate in and fund the two desegregation plans which the district court approved on June 11, 1981, and July 2, 1981 (Pet. App. A-113 to A-114; A-119 to A-120; A-128 to A-132). Those very issues had been decided by the court of appeals just one year earlier, when it held that there was an adequate predicate for requiring the State parties to provide such relief (667 F. 2d at 650-651, 656-659), and this Court had denied certiorari. Thus, the issues

decided by that appeal were *res judicata*,[8] and in the absence of any showing that "substantially different" evidence was introduced at a subsequent trial from that considered on the first appeal or that the previous decision is "clearly erroneous and works manifest injustice" petitioners' claims should not be reconsidered. *Houghton* v. *McDonnell Douglas Corp.*, 627 F. 2d 858, 864 (8th Cir. 1980); *Montana* v. *United States*, 440 U.S. 147 (1979); cf. *United States* v. *United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198 (1950).

2. In any event, petitioners' claims are without merit for the reasons explained in our opposition to their petition in No. 80-2152.

Here, as there (compare 80-2152 Pet. 20-24 with 81-2022 Pet. 7-13), petitioners contend that the district court's remedial orders (*i.e.*, paragraphs 12(a) and 12(b) of the May 21, 1980 order, as amended, and the plans implementing those paragraphs) are inconsistent with this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*) and *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). But the remedy provided for in the district court's July 2, 1981, order is wholly dissimilar to the inter-district relief that was ordered by the district court in *Milliken I*. The 12(a) plan encourages suburban school districts to participate in a student exchange program with city schools; participation in the plan is completely voluntary on the part of both students and suburban school districts.[9] The court of

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[8]The State parties to this appeal were also parties to the appeal decided in February 1981; this appeal involved the same cause of action as the February 1981 appeal; and the court of appeals' 1981 decision expressly rejected the argument that the orders appealed from were not final judgments and decided the State parties' liability for 12(a) and 12(b) relief on the merits (667 F. 2d at 650-651).

[9]The ten suburban districts that have agreed to participate in this exchange program retain control over educational matters within their boundaries.

appeals is fully cognizant of the requirements for mandatory inter-district relief set forth in *Milliken I* and of the necessity of affording the several suburban districts which are now parties to this litigation the opportunity for a hearing before the appropriateness of a *mandatory* inter-district remedy is decided (Pet. App. A-136 n.38; A-139 to A-140).

The court of appeals also correctly concluded that *Hills, supra*, provides an adequate legal basis for requiring the State parties to fund the 12(a) plan. The 12(a) plan was part of the district court's effort to remedy segregation within the City of St. Louis (667 F. 2d at 651). The district court had found, *inter alia*, that the State, "which prior to 1954 mandated school segregation, never took any effective steps to dismantle the dual system it had compelled" and that therefore it was liable for "the de jure segregation which existed in the St. Louis Public Schools" (491 F. Supp. at 357). This finding, which has twice been affirmed by the court of appeals (667 F. 2d at 654-655; Pet. App. A-113 to A-114), establishes that the State parties can and should be required to take appropriate remedial action for the constitutional violations in which they participated. See *Hills, supra*, 425 U.S. at 297-298.[10]

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[10]Petitioners suggest some doubt as to the "applicability of *Hills, supra*, a housing case[,] to a school desegregation case" (Pet. 11). *Hills* specifically addressed that issue and provided a clear exposition of the remedial powers of federal courts in both contexts. *Hills, supra*, 425 U.S. at 292-296. Petitioners also assert that whereas HUD engaged in discriminatory conduct in Chicago they "have not been found to have committed intentional segregative acts" (Pet. 11). This statement is contrary to the evidence regarding the State's role in establishing and maintaining a dual school system within the City of St. Louis, to the last three court of appeals decisions and to every district court ruling on state liability since the reversal of the district court's 1979 judgment. Petitioners next suggest that the 12(a) plan requires them to take actions which are not authorized by the state constitution or state statutes and, as a consequence, they must substantially alter their governmental

3. Petitioners apparently recognize (Pet. 17) that the district court's approval of the 12(b) plan could properly be based on the parties' acceptance of that plan in the proposed consent decree. They simply urge that there was no such acceptance here. But the court of appeals found that the district court's June 11, 1981, order "adopted the consent decree without significant modification" (Pet. App. A-124), and petitioners have not demonstrated that this finding is clearly erroneous. Petitioners' argument rests on the statement in the order that "the Court is reluctant under [the] circumstances here to enter an order and judgment as a 'consent decree' " (*id.* at A-49).[11] This statement is nothing more than a expression of concern about how to label the order; it does not amount to a rejection of the proposed consent decree.[12] The court of appeals properly looked

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structure (Pet. 12). Even if there is a state statute or constitutional provision prohibiting the State parties from providing the type of financial assistance required by the 12(a) plan—and none is cited by petitioners—it could not, consistent with the Supremacy Clause, override an otherwise valid federal court order requiring appropriate relief for a federal constitutional violation. The suggestion that any state involvement in voluntary inter-district student transfers is contrary to state policy is meritless. The Special School District was created pursuant to state statute, is partially financed by the State, and serves several suburban districts. Furthermore, the 12(a) plan respects traditional school district boundaries. It does not require a single student to cross district lines unless the student elects to do so.

[11]The "circumstances" referred to in the order were the unwillingness of the Liddell and Adams plaintiffs to sign the consent decree, Liddell because of concerns about the adequacy of the jurisdictional statement and Adams because of substantive objections to the plan. The district court found that the Adams group "are not ordered to take action or to desist from any action by reason of the decree and * * * their rights or legitimate interests have not been affected hereby" (Pet. App. A-49). The Adams plaintiff-intervenors were dismissed as parties to this litigation on their own motion on March 1, 1982.

[12]Indeed, the district court explained that it was "adopt[ing] the [parties' proposed] plan as its own because school desegregation is one of those areas in which voluntary resolution, if possible, is preferable to full litigation" (Pet. App. A-50).

behind the label. See *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). It carefully compared the terms of the order with those of the proposed consent decree and correctly found them substantively identical.[13] The addition of funding provisions to the district court's order does not constitute a modification of the terms of the proposed consent decree as petitioners claim (Pet. 21); these provisions were taken from a previous funding order which "was not a part of the parties' other agreements and submissions" (Pet. App. A-121 n.14; see *id.* at A-129 n.25).[14]

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[13]As the court of appeals explained (Pet. App. A-124):

> The June 11, 1981, order tracked the consent decree's format throughout, but also: (1) added certain quotations from previous court opinions; (2) fleshed out and updated the procedural history culminating in the consent decree and 12(b) plan; (3) discussed the general legal principles applicable to consent decrees; (4) held that the 12(b) plan was fair, reasonable, adequate and constitutionally sufficient; (5) ordered the SSD, city board and state to file an interim progress report by July 15, 1983; and (6) added various funding provisions.

Petitioners claim that the court's adoption of unspecified "modifications" recommended by the Liddell plaintiffs abrogated their consent to the proposed decree (Pet. 21). Those "modifications" comprise two sentences in the district court's order, one of which states "[t]his decree is made and entered into pursuant to prior orders of this Court, the Eighth Circuit Court of Appeals, and the stipulation of facts entered into by the parties hereto" (Pet. App. A-43) and the other of which reads "[t]his Court has jurisdiction of the subject matter of this class action, has jurisdiction over all the parties, and hereby enters this judgment and decree" (*id.* at A-44). See June 9, 1981 Tr. 9-11, 14, 35-41. These introductory statements did not alter any of the substantive provisions of the decree. Compare Pet. App. A-50 to A-55 with A-182 to A-184.

[14]Petitioners argue that, not just the funding provisions, but the entire June 11 order must be set aside. The court of appeals treated the funding provisions separately since the State parties had not consented to this part of the order, and the parties had consistently treated the funding issue separately (Pet. App. A-128 to A-133). It concluded that the

Because the district court's order did not reject or modify the consent decree which served as the basis for the court approved inter-district plan, this Court need not consider petitioners' claim that the court lacked power to order a remedial plan because no inter-district violation was proven (Pet. 14). Obviously, the parties who signed the consent decree waived their right to litigate the issue of whether there was an inter-district violation for the purposes of the relief embodied in both the decree and order (*United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971)), and the court of appeals found an adequate legal and factual basis for the funding provisions that were included in the order but not in the consent decree (see note 14, *supra*).[15]

4. Petitioners' contention (Pet. 24) that they have been found liable for constitutional violations since the inception of this litigation "without any allegation against * * * [them] and * * * [without any] opportunity to defend

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funding provisions were supported by the district court's finding of State liability for the dual city and county vocational systems (491 F. Supp. at 358) which it had affirmed in its February 1981 opinion (Pet. App. A-120, A-128).

Petitioners again assert (Pet. 16), as they did in their last petition in this case (80-2152 Pet. 26), that the finding that they had the power to merge the two vocational education systems is clearly erroneous. Now, as then, that basically factual contention does not warrant this Court's review.

[15]Petitioners argue at length (Pet. 14-17) that the district court's order cannot stand because the court failed to find the Special School District liable for an inter-district violation. Petitioners lack standing to raise these arguments. The court of appeals dismissed the Special School District's appeal (St. Louis Board of Education Br. in Opp. App. 4a-6a) and the District has not asked this Court to review that decision. In any event, the Special School District, like petitioners, signed the consent decree.

Although petitioners also charge that they lacked notice of any alleged inter-district violation (Pet. 14), they filed a pretrial brief suggesting the kind of relief embodied in paragraph 12(b) of the May 1980 order (State Br. filed May 12, 1980, at 12).

against such unknown and phantom charges" is unsupported. As we pointed out in our previous opposition (at 9-10), the motions to have the State parties added as defendants, together with the supporting memoranda, set forth the factual and legal bases for liability more thoroughly than notice pleading under Rule 8, Fed. R. Civ. P., would have demanded. After trial, the Caldwell plaintiffs amended their complaint to allege causes of action against the State parties. That step is permitted (though not required) by Rule 15(b), Fed. R. Civ. P., where issues not raised by the formal pleadings have been tried by consent of the parties. The rule assumes that triable allegations can be made and issues joined by means other than complaint and answer. Since June 1977, the parties have never charged their basic theory of State liability, which the district court adopted in May 1980 (491 F. Supp. at 359-360) and which the court of appeals affirmed in February 1981 (Pet. App. A-1 to A-25) and reaffirmed in February 1982 (Pet. App. A-109 to A-147). Considering that the State parties actively participated in every phase of this case since trial in 1977, including all remedial hearings, petitioners' claim to have been denied property without a prior hearing is without factual basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

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